MONTANA LEGISLATIVE HISTORY

Chapter 437 1999

Bill HB 486 S _____ Original bill & history ✓C

H. Committee on Natural Resources			S. Committee on Natural Resources		
Hearing Date(s)	2/08	C	Hearing Date(s)	3/12	C
ex	2/15	C		3/22	C
		C			C
		C			C
Date Out		C			

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

2/10	Fiscal Note Received		
2/10	Fiscal Note Signed		
2/10	Fiscal Note Printed		
2/11	Hearing		
3/10	Tabled in Committee		
3/26	Missed Deadline for Appropriation Bill Transmittal		

HB 484 Introduced by Anderson, et al. *LC1024 Drafter: MacMaster*

Submit to the Qualified Electors of Montana an Amendment to Article X, Section 4, of the Montana Constitution to Change the Membership of the Board of Land Commissioners

2/03	Introduced and 1st Reading		
2/03	Referred to Natural Resources		
3/01	Missed Deadline for General Bill Transmittal		

HB 485 Introduced by Anderson, et al. *LC1025 Drafter: Mitchell*

Provide for a Timber Conservation License in Lieu of the Sale of Timber on State Trust Lands and Establish a Bid Process for Conservation Licenses;...

2/03	Introduced and 1st Reading		
2/03	Referred to Natural Resources		
2/10	Hearing		
2/16	Committee Executive Action--Bill Passed	14	6
2/16	Committee Report--Bill Passed		
2/18	2nd Reading Passed	74	24
2/19	3rd Reading Passed	71	27
	Transmitted to Senate		
2/22	Referred to Natural Resources		
3/12	Hearing		
3/18	Committee Executive Action--Bill Concurred	10	0
3/18	Committee Report--Bill Concurred		
3/20	2nd Reading Concurred	42	0
3/22	3rd Reading Concurred	49	0
	Returned to House		
3/23	Sent to Enrolling		
3/23	Returned from Enrolling		
3/24	Signed by Speaker		
3/24	Signed by President		
3/25	Transmitted to Governor		
4/01	Signed by Governor		
4/06	Chapter Number Assigned		
	Chapter Number 224		
	Effective Date: 4/01/1999 - All Sections		

HB 486 Introduced by Anderson, et al. *LC1023 Drafter: Everts*

Define "Institutional Control";...

2/03	Introduced and 1st Reading		
2/03	Referred to Natural Resources		
2/08	Hearing		
2/09	Fiscal Note Requested		
2/15	Committee Executive Action--Bill Passed as Amended	13	7

2/15	Committee Report--Bill Passed as Amended		
2/18	2nd Reading Passed	52	47
2/19	3rd Reading Passed	55	45
	Transmitted to Senate		
2/19	Fiscal Note Received		
2/22	Referred to Natural Resources		
2/23	Fiscal Note Printed		
3/12	Hearing		
3/23	Committee Executive Action--Bill Concurred as Amended	8	1
3/23	Committee Report--Bill Concurred as Amended		
3/25	2nd Reading Concurred	50	0
3/26	3rd Reading Concurred	49	0
	Returned to House with Amendments		
4/13	2nd Reading Senate Amendments Concurred	81	15
4/14	3rd Reading Passed as Amended by Senate	62	37
4/14	Sent to Enrolling		
4/15	Returned from Enrolling		
4/16	Signed by Speaker		
4/16	Signed by President		
4/17	Transmitted to Governor		
4/23	Signed by Governor		
4/23	Chapter Number Assigned		
	Chapter Number 437		
	Effective Date: 4/23/1999 - All Sections		

HB 487 Introduced by Anderson, et al. *LC1705 Drafter: Everts*

Remove the Termination Date for the Fee for Reimbursement of Remedial Action Costs Incurred by the Department of Environmental Quality for Review and Oversight of a Voluntary Cleanup Plan;...

1/16	Fiscal Note Needed		
2/03	Introduced and 1st Reading		
2/03	Referred to Natural Resources		
2/03	Fiscal Note Requested		
2/08	Hearing		
2/15	Committee Executive Action--Bill Passed	14	6
2/15	Committee Report--Bill Passed		
2/16	Fiscal Note Received		
2/16	Fiscal Note Signed		
2/17	Fiscal Note Printed		
2/18	2nd Reading Passed	66	31
2/19	3rd Reading Passed	66	31
	Transmitted to Senate		
2/22	Referred to Natural Resources		
	Died in Standing Committee		

HB 488 Introduced by Wagner, et al. *LC1578 Drafter: Sternberg*

Submit to the Qualified Electors of Montana an Amendment to Article X, Section 11, of the Montana Constitution to Allow the State to Require a License or Charge a Fee for General Recreational Use of State Trust Lands;...

2/03	Introduced and 1st Reading
2/03	Referred to Fish, Wildlife, and Parks

House BILL NO. 486

INTRODUCED BY Anderson Crosfield HARP
(Primary Sponsor)
Cua McCarthy Younkin Ops Water Sales Hayne

A BILL FOR AN ACT ENTITLED: "AN ACT DEFINING "INSTITUTIONAL CONTROL"; CLARIFYING THE DEFINITION OF "ORPHAN SHARE"; REQUIRING THAT THE DEPARTMENT OF ENVIRONMENTAL QUALITY GIVE DUE CONSIDERATION TO INSTITUTIONAL CONTROLS IN SELECTING REMEDIAL ACTIONS; ESTABLISHING AN INSTITUTIONAL CONTROL PROCESS; PROPORTIONATELY REDUCING THE ORPHAN SHARE IF A POTENTIALLY RESPONSIBLE PERSON RECOVERS REMEDIAL ACTION COSTS FROM A FINANCIALLY RESPONSIBLE PARTY; AMENDING SECTIONS 75-10-701, 75-10-715, AND 75-10-721, MCA; REPEALING SECTION 27, CHAPTER 584, LAWS OF 1995; PROVIDING A CONTINGENT VOIDNESS PROVISION; AND PROVIDING EFFECTIVE DATES."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 75-10-701, MCA, is amended to read:

"**75-10-701. Definitions.** As used in this part, unless the context requires otherwise, the following definitions apply:

(1) "Department" means the department of environmental quality provided for in 2-15-3501.

(2) "Director" means the director of the department.

(3) "Environment" means any surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the state of Montana or under the jurisdiction of the state of Montana.

(4) (a) "Facility" means:

(i) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft; or

(ii) any site or area where a hazardous or deleterious substance has been deposited, stored, disposed of, placed, or otherwise come to be located.

(b) The term does not include any consumer product in consumer use.

(5) "Fiduciary" means a trustee, executor, administrator, personal representative, custodian,

conservator, guardian, or receiver acting or holding property for the exclusive benefit of another person. The term does not include:

(a) a person who has previously owned or operated the property in a nonfiduciary capacity; or

(b) a person acting as fiduciary with respect to a trust or other fiduciary estate that has no objectively reasonable or substantial purpose apart from avoidance of or limitation of liability under this part. For the purposes of 75-10-715(9), the term does not include the state, a state agency, or a political subdivision of the state acting as trustee of natural resources within the state of Montana.

(6) "Foreclosure" means acquisition of title to property through foreclosure, purchase at foreclosure sale, assignment or acquisition of title in lieu of foreclosure, repossession in the case of a lease financing transaction, or acquisition of a right to title or other agreement in full or partial settlement of a loan obligation.

(7) "Fund" means the environmental quality protection fund established in 75-10-704.

(8) "Hazardous or deleterious substance" means a substance that because of its quantity, concentration, or physical, chemical, or infectious characteristics may pose an imminent and substantial threat to public health, safety, or welfare or the environment and is:

(a) a substance that is defined as a hazardous substance by section 101(14) of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601(14), as amended;

(b) a substance identified by the administrator of the United States environmental protection agency as a hazardous substance pursuant to section 102 of CERCLA, 42 U.S.C. 9602, as amended;

(c) a substance that is defined as a hazardous waste pursuant to section 1004(5) of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6903(5), as amended, including a substance listed or identified in 40 CFR 261; or

(d) any petroleum product.

(9) "Household" means single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, day-use recreational areas, or similar structures or areas.

(10) "Household refuse" means garbage, trash, and sanitary wastes in septic tanks that are derived from a household.

(11) "Institutional control" means a restriction on the use of real property that mitigates the risk

posed to public health, safety, and welfare and the environment. Institutional controls include but are not limited to:

(a) deed restrictions;

(b) easements;

(c) reservations;

(d) convenants, either restrictive or affirmative; and

(e) other mechanisms or physical restrictions for controlling present and future land use, including controlled ground water areas, that are placed upon real property to mitigate the risk to public health, safety, and welfare and the environment.

~~(11)~~(12) "Natural resources" means land, fish, wildlife, biota, air, surface water, ground water, drinking water supplies, and any other resources within the state of Montana owned, managed, held in trust, or otherwise controlled by or appertaining to the state of Montana or a political subdivision of the state.

~~(12)~~(13) "Orphan share" means the percentage share of remedial action costs for a facility that is attributable, under the procedures in 75-10-742 through 75-10-752, to identified but bankrupt or defunct persons who are not ~~affiliated with~~ an affiliate of any viable person, unless affiliated by stock ownership.

~~(13)~~(14) "Orphan share fund" means the fund for the orphan share account established in 75-10-743.

~~(14)~~(15) (a) "Owns or operates" means owning, leasing, operating, managing activities at, or exercising control over the operation of a facility.

(b) The term does not include holding the indicia of ownership of a facility primarily to protect a security interest in the facility or other location unless the holder has participated in the management of the facility. The term does not apply to the state or a local government that acquired ownership or control through bankruptcy, tax delinquency, abandonment, lien foreclosure, or other circumstances in which the government acquires title by virtue of its function as sovereign, unless the state or local government has caused or contributed to the release or threatened release of a hazardous or deleterious substance from the facility. The term also does not include the owner or operator of the Milltown dam licensed under part 1 of the Federal Power Act (FERC license No. 2543-004) if a hazardous or deleterious substance has been released into the environment upstream of the dam and has subsequently come to be located in the

reservoir created by the dam, unless the owner or operator is a person who would otherwise be liable for a release or threatened release under 75-10-715(1).

~~(15)~~(16) "Person" means an individual, trust, firm, joint-stock company, joint venture, consortium, commercial entity, partnership, association, corporation, commission, state or state agency, political subdivision of the state, interstate body, or the federal government, including a federal agency.

~~(16)~~(17) "Petroleum product" includes gasoline, crude oil (except for crude oil at production facilities subject to regulation under Title 82), fuel oil, diesel oil or fuel, lubricating oil, oil sludge or refuse, and any other petroleum-related product or waste or fraction of the product or waste that is liquid at standard conditions of temperature and pressure (60 degrees F and 14.7 pounds per square inch absolute).

~~(17)~~(18) "Reasonably anticipated future uses" means likely future land or resource uses that take into consideration:

(a) local land and resource use regulations, ordinances, restrictions, or covenants;

(b) historical and anticipated uses of the facility;

(c) patterns of development in the immediate area; and

(d) relevant indications of anticipated land use from the owner of the facility and local planning officials.

~~(18)~~(19) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous or deleterious substance directly into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous or deleterious substance), but excludes releases confined to the indoor workplace environment, the use of pesticides as defined in 80-8-102(30) when they are applied in accordance with approved federal and state labels, and the use of commercial fertilizers, as defined in 80-10-101(2), when applied as part of accepted agricultural practice.

~~(19)~~(20) "Remedial action" includes all notification, investigation, administration, monitoring, cleanup, restoration, mitigation, abatement, removal, replacement, acquisition, enforcement, legal action, health studies, feasibility studies, and other actions necessary or appropriate to respond to a release or threatened release.

~~(20)~~(21) "Remedial action contract" means a written contract or agreement entered into by a remedial action contractor with the state, or with a potentially liable person acting pursuant to an order

or request issued by the department, the United States, or any federal agency, to provide a remedial action with respect to a release or threatened release of a hazardous or deleterious substance.

~~(21)~~(22) "Remedial action contractor" means:

(a) any person who enters into and is carrying out a remedial action contract; or

(b) any person who is retained or hired by a person described in subsection ~~(21)(a)~~ (22)(a) to provide services relating to a remedial action.

~~(22)~~(23) "Remedial action costs" means reasonable costs that are attributable to or associated with a remedial action at a facility, including but not limited to the costs of administration, investigation, legal or enforcement activities, contracts, feasibility studies, or health studies."

Section 2. Section 75-10-715, MCA, is amended to read:

"**75-10-715. Liability -- reimbursement and penalties -- proceedings -- defenses and exclusions.** (1) Except as provided in 75-10-742 through 75-10-752, notwithstanding any other provision of law, and subject only to the defenses set forth in subsection (5) and the exclusions set forth in subsection (7), the following persons are jointly and severally liable for a release or threatened release of a hazardous or deleterious substance from a facility:

(a) a person who owns or operates a facility where a hazardous or deleterious substance was disposed of;

(b) a person who at the time of disposal of a hazardous or deleterious substance owned or operated a facility where the hazardous or deleterious substance was disposed of;

(c) a person who generated, possessed, or was otherwise responsible for a hazardous or deleterious substance and who, by contract, agreement, or otherwise, arranged for disposal or treatment of the substance or arranged with a transporter for transport of the substance for disposal or treatment; and

(d) a person who accepts or has accepted a hazardous or deleterious substance for transport to a disposal or treatment facility.

(2) A person identified in subsection (1) is liable for the following costs:

(a) all remedial action costs incurred by the state; and

(b) damages for injury to, destruction of, or loss of natural resources caused by the release or threatened release, including the reasonable technical and legal costs of assessing and enforcing a claim

for the injury, destruction, or loss resulting from the release, unless the impaired natural resources were specifically identified as an irreversible and irretrievable commitment of natural resources in an approved final state or federal environmental impact statement or other comparable approved final environmental analysis for a project or facility that was the subject of a governmental permit or license and the project or facility was being operated within the terms of its permit or license.

(3) If the person liable under subsection (1) fails, without sufficient cause, to comply with a department order issued pursuant to 75-10-711(4) or to properly provide remedial action upon notification by the department pursuant to 75-10-711(3), the person may be liable for penalties in an amount not to exceed two times the amount of any costs incurred by the state pursuant to this section.

(4) The department may initiate civil proceedings in district court to recover remedial action costs, natural resource damages, or penalties under subsections (1), (2), and (3). Proceedings to recover costs and penalties must be conducted in accordance with 75-10-722. Venue for any action to recover costs, damages, or penalties lies in the county where the release occurred or where the person liable under subsection (1) resides or has its principal place of business or in the district court of the first judicial district.

(5) A person has a defense and is not liable under subsections (1), (2), and (3) if the person can establish by a preponderance of the evidence that:

(a) the department failed to follow the notice provisions of 75-10-711 when required;

(b) the release did not emanate from any vessel, vehicle, or facility to which the person contributed any hazardous or deleterious substance or over which the person had any ownership, authority, or control and was not caused by any action or omission of the person;

(c) the release or threatened release occurred solely as a result of:

(i) an act or omission of a third party other than either an employee or agent of the person; or

(ii) an act or omission of a third party other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the person, if the person establishes by a preponderance of the evidence that the person:

(A) exercised due care with respect to the hazardous or deleterious substance concerned, taking into consideration the characteristics of the hazardous or deleterious substance in light of all relevant facts and circumstances; and

(B) took precautions against foreseeable acts or omissions of a third party and the consequences

that could foreseeably result from those acts or omissions;

(d) the release or threat of release occurred solely as the result of an act of God or an act of war;

(e) the release or threatened release was from a facility for which a permit had been issued by the department, the hazardous or deleterious substance was specifically identified in the permit, and the release was within the limits allowed in the permit;

(f) in the case of assessment of penalties under subsection (3), factors beyond the control of the person prevented the person from taking timely remedial action; or

(g) the person transported only household refuse, unless that person knew or reasonably should have known that the hazardous or deleterious substance was present in the refuse.

(6) (a) For the purpose of subsection (5)(c)(ii), the term "contractual relationship" includes but is not limited to land contracts, deeds, or other instruments transferring title or possession, unless the real property on which the facility is located was acquired by the person after the disposal or placement of the hazardous or deleterious substance on, in, or at the facility and one or more of the following circumstances is also established by the person by a preponderance of the evidence:

(i) At the time the person acquired the facility, the person did not know and had no reason to know that a hazardous or deleterious substance that is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The person is a governmental entity that acquired the facility by escheat, lien foreclosure, or through any other involuntary transfer or acquisition or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The person acquired the facility by inheritance or bequest.

(b) In addition to establishing one or more of the circumstances in subsection (6)(a)(i) through (6)(a)(iii), the person shall establish that the person has satisfied the requirements of subsection (5)(c)(i) or (5)(c)(ii).

(c) To establish that the person had no reason to know, as provided in subsection (6)(a)(i), the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of assessing this inquiry, the following must be taken into account:

(i) any specialized knowledge or experience on the part of the person;

(ii) the relationship of the purchase price to the value of the property if uncontaminated;

(iii) commonly known or reasonably ascertainable information about the property;

(iv) the obviousness of the presence or the likely presence of contamination on the property; and

(v) the ability to detect the contamination by appropriate inspection.

(d) (i) Subsections (5)(b) and (5)(c) or this subsection (6) may not diminish the liability of a previous owner or operator of the facility who would otherwise be liable under this part.

(ii) Notwithstanding this subsection (6), if the previous owner or operator obtained actual knowledge of the release or threatened release of a hazardous or deleterious substance at the facility when the person owned the real property and then subsequently transferred ownership of the property to another person without disclosing the knowledge, the previous owner is liable under subsections (1), (2), and (3) and a defense under subsection (5)(b) or (5)(c) is not available to that person.

(e) Subsection (6) does not affect the liability under this part of a person who, by any act or omission, caused or contributed to the release or threatened release of a hazardous or deleterious substance that is the subject of the action relating to the facility.

(7) A person has an exclusion and is not liable under this section if:

(a) the person generated or disposed of only household refuse, unless the person knew or reasonably should have known that the hazardous or deleterious substance was present in the refuse;

(b) the person owns or operates real property where hazardous or deleterious substances have come to be located solely as a result of subsurface migration in an aquifer from a source or sources outside the person's property, provided that the following conditions are met:

(i) the owner or operator did not cause, contribute to, or exacerbate the release or threatened release of any hazardous or deleterious substances through any act or omission. The failure to take affirmative steps to mitigate or address contamination that has migrated from a source outside the owner's or operator's property does not, in the absence of exceptional circumstances, constitute an omission by the owner or operator.

(ii) the person who caused, contributed to, or exacerbated the release or threatened release of any hazardous or deleterious substance is not and was not an agent or employee of the owner or operator and is not or was not in a direct or indirect contractual relationship with the owner or operator, unless the department provides a written determination that an existing or proposed contractual relationship is an insufficient basis to establish liability under this section;

(iii) there is no other basis of liability under subsection (1) for the owner or operator for the release

or threatened release of a hazardous or deleterious substance; and

(iv) the owner or operator cooperates with the department and all persons conducting department-approved remedial actions on the property, including granting access and complying with and implementing all required institutional controls;

(c) the person owns or occupies real property of 20 acres or less for residential purposes, provided that the following conditions are met:

(i) the person did not cause, contribute to, or exacerbate the release or threatened release of any hazardous or deleterious substance through any act or omission;

(ii) the person uses or allows the use of the real property for residential purposes. This exclusion does not apply to any person who acquires or develops real property for commercial use or any use other than residential use.

(iii) at the time the person purchased or occupied the real property, there were no visible indications of contamination on the surface of the real property;

(iv) the person cooperates with the department and all persons conducting department-approved remedial actions on the property, including granting access and complying with and implementing all required institutional controls; and

(v) there is no other basis of liability under subsection (1) for the owner or occupier for the release or threatened release of a hazardous or deleterious substance.

(8) A person is liable under this section if the department provides substantial credible evidence that the person fails to satisfy any element of each exclusion in subsections (7)(a) through (7)(c).

(9) The liability of a fiduciary under the provisions of this part for a release or a threatened release of a hazardous or deleterious substance from a facility held in a fiduciary capacity may not exceed the assets held in the fiduciary capacity that are available to indemnify the fiduciary unless the fiduciary is liable under this part independent of the person's ownership or actions taken in a fiduciary capacity.

(10) A person who holds indicia of ownership in a facility primarily to protect a security interest is not liable under subsections (1)(a) and (1)(b) for having participated in the management of a facility within the meaning of ~~75-10-701(14)(b)~~ 75-10-701(15)(b) because of any one or any combination of the following:

(a) holding an interest in real or personal property when the interest is being held as security for payment or performance of an obligation, including but not limited to a mortgage, deed of trust, lien,

security interest, assignment, pledge, or other right or encumbrance against real or personal property that is furnished by the owner to ensure repayment of a financial obligation;

(b) requiring or conducting financial or environmental assessments of a facility or a portion of a facility, making financing conditional upon environmental compliance, or providing environmental information or reports;

(c) monitoring the operations conducted at a facility or providing access to a facility to the department or its agents or to remedial action contractors;

(d) having the mere capacity or unexercised right to influence a facility's management of hazardous or deleterious substances;

(e) giving advice, information, guidance, or direction concerning the administrative and financial aspects, as opposed to day-to-day operational aspects, of a borrower's operations;

(f) providing general information concerning federal, state, or local laws governing the transportation, storage, treatment, and disposal of hazardous or deleterious substances and concerning the hiring of remedial action contractors;

(g) engaging in financial workouts, restructuring, or refinancing of a borrower's obligations;

(h) collecting rent, maintaining utility services, securing a facility from unauthorized entry, or undertaking other activities to protect or preserve the value of the security interest in a facility;

(i) extending or denying credit to a person owning or in lawful possession of a facility;

(j) in an emergency, requiring or undertaking activities to prevent exposure of persons to hazardous or deleterious substances or to contain a release;

(k) requiring or conducting remedial action in response to a release or threatened release if prior notice is given to the department and the department approves of the remedial action; or

(l) taking title to a facility by foreclosure, provided that the holder of indicia of ownership, from the time the holder acquires title, undertakes to sell, re-lease property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of the property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the facility and taking all facts and circumstances into consideration and provided that the holder does not:

(i) outbid or refuse a bid for fair consideration for the property or outbid or refuse a bid that would effectively compensate the holder for the amount secured by the facility;

(ii) worsen the contamination at the facility;

(iii) incur liability under subsection (1)(c) or (1)(d) by arranging for disposal of or transporting hazardous or deleterious substances; or

(iv) engage in conduct described in subsection (11).

(11) The protection from liability provided in subsections (9) and (10) is not available to a fiduciary or to a person holding indicia of ownership primarily to protect a security interest if the fiduciary or person through affirmative conduct:

(a) causes or contributes to a release of hazardous or deleterious substances from the facility;

(b) allows others to cause or contribute to a release of hazardous or deleterious substances; or

(c) in the case of a person holding indicia of ownership primarily to protect a security interest, actually participates in the management of a facility by:

(i) exercising decisionmaking control over environmental compliance; or

(ii) exercising control at a level comparable to that of a manager of the enterprise with responsibility for day-to-day decisionmaking either with respect to environmental compliance or substantially all of the operational, as opposed to financial or administrative, aspects of the facility."

Section 3. Section 75-10-721, MCA, is amended to read:

"**75-10-721. Degree of cleanup required -- permit exemption -- financial assurance.** (1) A remedial action performed under this part or a voluntary cleanup under 75-10-730 through 75-10-738 must attain a degree of cleanup of the hazardous or deleterious substance and control of a threatened release or further release of that substance that assures protection of public health, safety, and welfare and of the environment.

(2) In approving or carrying out remedial actions performed under this part, the department:

(a) except as provided in subsection (4), shall require cleanup consistent with applicable state or federal environmental requirements, criteria, or limitations;

(b) may consider substantive state or federal environmental requirements, criteria, or limitations that are relevant to the site conditions; and

(c) shall select remedial actions, considering present and reasonably anticipated future uses, <u>giving due consideration to institutional controls,</u> that:

(i) demonstrate acceptable mitigation of exposure to risks to the public health, safety, and welfare

and the environment;

(ii) are effective and reliable in the short term and the long term;

(iii) are technically practicable and implementable;

(iv) use treatment technologies or resource recovery technologies if practicable, giving due consideration to institutional and engineering controls; and

(v) are cost-effective.

(3) In selecting remedial actions, the department shall consider the acceptability of the actions to the affected community, as indicated by community members and the local government.

(4) The department may select a remedial action that does not meet an applicable state environmental requirement, criteria, or limitation under any one of the following circumstances:

(a) The remedial action is an interim measure and will become part of a total remedial action that will attain the applicable requirement, criteria, or limitation.

(b) Compliance with the applicable requirement, criteria, or limitation will result in greater risk to human health and the environment than other remedial action alternatives.

(c) Compliance with the applicable requirement, criteria, or limitation is technically impracticable from an engineering perspective.

(d) The remedial action will attain a standard of performance that is equivalent to that required under the otherwise applicable requirement, criteria, or limitation through use of another method or approach.

(e) Compliance with the requirement would not be cost-effective.

(5) For purposes of this section, cost-effectiveness must be determined through an analysis of incremental costs and incremental risk reduction and other benefits of alternatives considered, taking into account the total anticipated short-term and long-term costs of remedial action alternatives considered, including the total anticipated cost of operation and maintenance activities.

(6) The department may exempt any portion of a remedial action that is conducted entirely on site from a state or local permit that would, in the absence of the remedial action, be required if the remedial action is carried out in accordance with the standards established under this section and this part.

(7) The department may require financial assurance from a liable person in an amount that the department determines will ensure the long-term operation and maintenance of the remedial action site.

The liable person shall provide the financial assurance by any one method or combination of methods satisfactory to the department, including but not limited to insurance, guarantee, performance or other surety bond, letter of credit, qualification as a self-insurer, or other demonstration of financial capability."

NEW SECTION. **Section 4. Institutional controls.** (1) An owner of real property may restrict the use of the owner's real property to mitigate the risk posed to the public health, safety, and welfare and the environment by imposing on the real property, without conveying the property or creating a dominant and servient estate, an appropriate institutional control.

(2) An institutional control restricting present and future real property rights is placed on a property by filing a written instrument evidencing the restrictions to be placed on the use of the property with the county clerk in the county in which the property is located.

(3) An institutional control that restricts real property runs with the land and is binding on all successors in interest to real property until the institutional control is removed.

(4) An institutional control must be removed if there is not an unacceptable risk posed to public health, safety, and welfare and the environment. An owner may request department approval to remove all or a portion of the institutional controls from the real property. The department shall review the request and provide the owner with its decision to approve or deny the request within 120 days from the department's receipt of the request. If the department denies the request, it shall provide the owner with a written explanation of the denial. A department decision to deny the request may be appealed to the board of environmental review and conducted as a contested case proceeding pursuant to Title 2, chapter 4.

(5) If the department or the board approves an owner's request to remove all or a portion of the institutional controls, the owner shall file the approval with the county clerk in the county in which the real property is located.

NEW SECTION. **Section 5. Remedial action costs.** (1) If a potentially responsible person or assignee recovers remedial action costs at a particular site from a financially responsible party, reimbursement from the orphan share is proportionally reduced by the amount of remedial action costs recovered, less any litigation expenses, including attorney fees and costs.

(2) The department may, in defending the orphan share, initiate a court action against a potentially

liable party, an affiliate, or another financially responsible party to recover the orphan's share.

NEW SECTION. **Section 6. Repealer.** Section 27, Chapter 584, Laws of 1995, is repealed.

NEW SECTION. **Section 7. Codification instruction.** [Sections 4 and 5] are intended to be codified as an integral part of Title 75, chapter 10, part 7, and the provisions of Title 75, chapter 10, part 7, apply to [sections 4 and 5].

NEW SECTION. **Section 8. Contingent voidness.** (1) If Constitutional Initiative No. 75, enacting Article VIII, section 17, of the Montana constitution is declared invalid, then [section 6] is effective on the date of the determination of invalidity.

(2) If [LC 1705] is submitted to and is not approved by the electorate, then [section 6 of this act] is void.

NEW SECTION. **Section 9. Effective dates.** (1) Except as provided in subsection (2), [this act] is effective on passage and approval.

(2) [Section 6] is effective upon the occurrence of the contingency provided for in [section 8(1)].

- END -

FISCAL NOTE

Bill #: HB0486 **Title: Generally revise CECRA**

Primary Sponsor: Shiell Anderson **Status: As introduced**

Sponsor signature Date

Dave Lewis 2-19-99

Dave Lewis, Budget Director Date

Fiscal Summary

	FY2000 Difference	FY2001 Difference
Expenditures:		
State Special Revenue	$224,653	$221,047
Revenue:		
State Special Revenue	0	$750,000
Net Impact on General Fund Balance:	**0**	**0**

Yes	No		Yes	No	
	X	Significant Local Gov. Impact	X		Technical Concerns
	X	Included in the Executive Budget		X	Significant Long- Term Impacts

Fiscal Analysis

ASSUMPTIONS:

Section 4

1. The DEQ is not authorized to directly recover its attorney fees and litigation costs from insurance proceeds. However, DEQ can get reimbursed for those costs from the Orphan Share Fund. A private party (potentially liable party (PLP)) can recover costs from insurance proceeds indirectly by deducting those costs from insurance proceeds, prior to reimbursing the Orphan Share Fund.
2. There will be two liability allocation petitions as of fiscal year end (FYE) 1999 in the allocation process set forth in the Controlled Allocation of Liability Act (CALA) and the allocations will continue in the 2001 biennium.
3. The 56th Legislature will approve DEQ's $1,000,000 request for the biennium for Orphan Share reimbursement authority and reimbursement payments for the two petitions in existence as of FYE99 will be made out of this authority.

HB 486

4. Sites with insurance coverage will now petition for reimbursement under CALA and two new CALA petitions will be received each year in FY 2000 and FY 2001.
5. DEQ will research the viability of initiating litigation to recover remedial action costs that have been reimbursed to participating potentially liable parties (PLPs) from the Orphan Share Fund for one of the two petitions received each year.
6. The cost to research the viability of initiating litigation to recover remedial action costs that have been reimbursed to PLPs from the Orphan Share is assumed to be as follows (one each year):
   a) 50 hours (0.02 FTE) of DEQ legal staff time/year (grade 17 attorney)
      (50 hrs. x $15.877/hour) x 127% = $1,008
   b) 150 hours of outside legal counsel specializing in insurance cases @ $125/hour = $18,750/year.
7. The state will pursue litigation on one petition each biennium and ½ of the litigation costs will occur in the first year of the biennium and ½ in the second year of the biennium, and the litigation will result in repayment of the reimbursement amount in the second year of the biennium. Litigation will only be pursued if legal research shows that orphan share costs reimbursed can be recovered from insurance proceeds and these costs will not be less than litigation costs.
8. Litigation assumptions are as follows:
   a) There will be at least five insurance carriers involved in each legal proceeding and all carriers will be sued under one action.
   b) Litigation will take two years.
   c) The trial will take two weeks.
   d) There will be no appeals; appeal costs have not been included in this fiscal note.
9. The cost of litigation is assumed to be as follows:
   a) 1,600 total hours; 800 hours/year (0.38 FTE) of DEQ legal staff time (grade 17 attorney)
      (800 hrs. x $15.877/hour) x 127% (benefits) = $16,132
   b) 2,850 hours; 1425 hours/year of outside legal counsel specializing in insurance cases @ $125/hour = $178,125 per year.

Section 6

12. Twenty-five voluntary cleanups will occur in FY 2000 and 20 will occur in FY 2001. Of these, 13 sites in FY 2000 and 10 sites in FY 2001 will include institutional controls.
13. Five CECRA (non-voluntary) cleanups each year for FY 2000 and FY 2001 will include institutional controls.
14. Five petitions to remove institutional controls will be submitted each year for review.
15. The cost of reviewing institutional control documents to determine applicability will total $25,870 and the technical staff time costs will be absorbed by the DEQ. Costs are calculated as follows:
   a) 20 hours of technical staff time @ $20 (including benefits)/hour = $400
      FY 2000 costs = $400 x 23 reviews = $9,200
      FY 20901 costs = $400 x 20 reviews = $8,000
   b) 10 hours of DEQ legal staff (grade 17 attorney) time
      FY 2000 = 10 hours x 23 reviews = 230 hours (0.11 FTE)
      (230 hrs. x $15.877 per hour) x 127% = $4,638
      FY 2001 = 10 hours x 20 reviews = 200 hours (0.10 FTE)
      (200 hours x $15.877 per hour) x 127% = $4,032

General

16. Benefits are 127% of salary costs and other operating expenses are $6,000 for FY 2000 and $3,000 for FY 2001 for the 0.50 FTE.

17. There will be enough revenue in the Orphan Share Account over the next biennium to fund the identified costs and to make the assumed reimbursements.

FISCAL IMPACT:

	FY2000 Difference	FY2001 Difference
DEQ		
FTE	0.50	0.50
Expenditures:		
Personal Services	$21,778	$21,172
Operating Expenses	202,875	199,875
TOTAL	$224,653	$221,047
Funding:		
State Special Revenue (02)	$224,653	$221,047
Revenues:		
State Special Revenue (02)	0	$750,000
Net Impact to Fund Balance (Revenue minus Expenditure):		
State Special Revenue (02)	($224,653)	$528,953

TECHNICAL NOTES:

An amendment to 75-10-743 (2) is recommended to clearly allow the deposit of recovered insurance proceeds into the Orphan Share Fund.

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN BILL TASH**, on February 08, 1999 at 3:02 P.M., in Room 437 Capitol.

ROLL CALL

Members Present:

Rep. Bill Tash, Chairman (R)
Rep. Hal Harper, Vice Chairman (D)
Rep. Cindy Younkin, Vice Chairman (R)
Rep. Rod Bitney (R)
Rep. Aubyn A. Curtiss (R)
Rep. Bill Eggers (D)
Rep. Ron Erickson (D)
Rep. David Ewer (D)
Rep. Gail Gutsche (D)
Rep. Joan Hurdle (D)
Rep. Dan McGee (R)
Rep. Douglas Mood (R)
Rep. Scott J. Orr (R)
Rep. Bob Raney (D)
Rep. Bob Story (R)
Rep. Jay Stovall (R)
Rep. Carley Tuss (D)
Rep. Doug Wagner (R)

Members Excused: Rep. Rick Dale (R)
Rep. Karl Ohs (R)

Members Absent: None.

Staff Present: Deb Thompson, Committee Secretary
Kathleen Williams, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 486, 2/10/1999; HB 487, 2/10/1999; HB 505, 2/10/1999
Executive Action: HB 340

HEARING ON HOUSE BILL 486

Sponsor: Rep. Shiell Anderson, HD 25, said the bill would give institutional control to local government bodies to clarify clean up responsibilities. This would define "institutional control", allows institutional controls by land owners without transfer the property to somebody else, and provide a framework for the removal of these controls.

Proponents: Steve Wade, RODEA-formerly Rhone Polenc in Butte, spoke in favor of the bill. He said this would allow for quicker and more cost effective cleanup. He said this would allow a person to put institutional controls, filing an instrument of burden to the property which runs with the land and is binding on all successors of interest. This clears up problems of enforce ability. The bill also provides a mechanism to remove institutional controls when the risk is no longer there. This will allow property to be more marketable once the cleanup has been achieved and there is no longer a risk associated with the property. He noted that Bob Brown from Columbia Falls Aluminum, who could not attend the hearing, asked to be listed as a proponent. ***{Tape : 1; Side : A; Approx. Time Counter : 6.6}***

Leo Berry, Burlington Northern Santa Fe, pointed out page 13, line 26, and explained the purpose. He described a situation encountered where a facility on their property went bankrupt. Burlington Northern Santa Fe was obligated under the superfund to clean that site up. This was not a problem but the issue of insurance coverage on the bankrupt facility. The old policy could have been claimed against to clean up the facility. The DNRC said if there was a potential of insurance coverage you could not recover from the Orphan's Share account. The section addresses this issue regarding a private party suing a financially responsible party, like a bonding company or insurance company, and they are successful on behalf of the Orphan, that money gets credited to the Orphan Share account - less the litigation cost to bring the action. The bill would address the recovery of litigation costs.

Troy Harbard, the environmental manager for Pacific Steel and Recycling in Great Falls, encouraged the committee to pass the bill. He said to date they have successfully used this law to clean up four sites. This works very well and he encouraged continuation of this. They support the institutional control. They have used it in other states. It is a very successful way to take a scrap yard and make it protective of human health and the environment. It works well at the federal level and other states.

Mark Simonich, Director of Department of Environmental Quality, spoke in support of the bill. He pointed out there were some language concerns but they believed in the concept of institutional controls. These legal restrictions on the use of property can be an important means of ensuring that people are not exposed to hazardous substances or that elements of clean up of that repository have not been disturbed. The big debate regarding institutional controls is the extent that they may be substituted for clean up rather than used to insure or enhance the protectiveness of a cleanup. He pointed out it would not be good to have a lot of land sealed off with fences and legal restrictions on its use and then not be cleaned up. Where institutional controls are appropriate it is important that a mechanism be clear and enforceable. ***{Tape : 1; Side : A; Approx. Time Counter : 12.2 - 21.4}***

Don Allen, Western Environmental Trade Association, spoke in support of the bill.

Chris Gallus, Montana Chamber of Commerce, spoke in support of the bill.

Opponents: Anne Hedges, Montana Environmental Information Center, talked about her concerns. The definitions of institutional controls should be consistent. She explained that institutional controls do not mitigate the risk but rather protect the public from a site. ***{Tape : 1; Side : A; Approx. Time Counter : 22.7 - 31}***

Questions from Committee Members and Responses: Rep. Erickson asked about sacrifice zones and if institutional controls had hidden problems. Simonich replied he was referring to HB 331 which tried to give local governments some control, recognizing that when the department is faced with working with responsible parties to do a clean up, the most appropriate remedy is determined. There are many cases where the clean up of that property need some protection for the long term, either they can't be cleaned up completely or a repository needs to remain intact. The department thinks institutional controls are appropriate, recognizing they need to be a part of the total remedy.

Rep. Harper noted that people were afraid that institutional controls would become a substitute for cleanup. He said there could be problems associated with removal of the controls, regarding the transfer and maintenance of damaged lands forever. He asked why institutional controls were not being referred to in a temporary sense. Simonich said an institutional control may have to be permanent. Once you create a repository you don't

want somebody digging into that. These control are institutionalized to make sure that remedy stays in place.

{Tape : 1; Side B}

Closing by Sponsor: Rep. Anderson discussed a technical amendment **EXHIBIT(1)**. He pointed out the department must approve the institutional controls. This bill does not set up sacrifice zones because the owner of real property wants to make that property as marketable as possible. He might want institutional controls because he is continuing to use that property. Later if technology is available it would allow remediation to remove institutional control.

HEARING ON HOUSE BILL 487

Sponsor: Shiell Anderson, HD 25, presented the bill. The bill allows for CI-75 compliance. It removes the termination date for the department to collect the feels for oversight of the cleanup plans. ***{Tape : 1; Side : B; Approx. Time Counter : 7.7 - 8.3}***

Proponents: Steve Wade, RODEA, supported the bill.

Opponents: None

Questions from Committee Members and Responses: Rep. Hurdle asked for an explanation about the fee for reimbursement of the remedial action costs. She asked if the DNRC had to recover the costs even with voluntary cleanup. Simonich replied the DEQ would recover its costs in reviewing the applicants proposal and the way the responsible parties are going to do the cleanup. The law allows for voluntary cleanup but doesn't just allow the party to go out and do whatever they want without any kind of oversight from the department. The reason this bill is necessary is that the voluntary cleanup program was set to sunset. CI-75 was set up so that anytime a department had to collect a new fee it had to go before a vote of the public. Even this is cost collection it is considered a new fee thereby needing to be approved by a public vote.

Closing by Sponsor: Rep. Anderson closed.

EXHIBIT 1
DATE 2-8-99
HB 486

1

Amendments to House Bill No. 486
1st Reading Copy

Requested by Representative Shiell Anderson

For the House Natural Resources Committee

Prepared by Todd Everts
February 5, 1999

1. Page 12, line 5.
Strike: "institutional and"

- END -

HOUSE OF REPRESENTATIVE
ROLL CALL

NATURAL RESOURCES COMMITTEE

DATE 2-08-99

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bill Tash, Chairman	✓		
Rep. Hal Harper, Vice Chair	✓		
Rep. Cindy Younkin, Vice Chair	✓		
Rep. Rod Bitney	✓		
Rep. Aubyn Curtiss	✓		
Rep. Rick Dale			✓
Rep. Bill Eggers	✓		
Rep. Ron Erickson	✓		
Rep. David Ewer	✓		
Rep. Gail Gutsche	✓		
Rep. Joan Hurdle	✓		
Rep. Dan McGee	✓		
Rep. Douglas Mood	✓		
Rep. Karl Ohs			✓
Rep. Scott Orr	✓		
Rep. Bob Raney	✓		
Rep. Bob Story	✓		
Rep. Jay Stovall	✓		
Rep. Carley Tuss	✓		
Rep. Doug Wagner	✓		

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN BILL TASH**, on February 12, 1999 at 3:00 P.M., in Room 437 Capitol.

ROLL CALL

Members Present:

Rep. Bill Tash, Chairman (R)
Rep. Cindy Younkin, Vice Chairman (R)
Rep. Aubyn A. Curtiss (R)
Rep. Rick Dale (R)
Rep. Bill Eggers (D)
Rep. Ron Erickson (D)
Rep. David Ewer (D)
Rep. Gail Gutsche (D)
Rep. Joan Hurdle (D)
Rep. Dan McGee (R)
Rep. Douglas Mood (R)
Rep. Karl Ohs (R)
Rep. Scott J. Orr (R)
Rep. Bob Raney (D)
Rep. Bob Story (R)
Rep. Jay Stovall (R)
Rep. Carley Tuss (D)
Rep. Doug Wagner (R)

Members Excused: Rep. Hal Harper, Vice Chairman (D)
Rep. Rod Bitney (R)

Members Absent: None.

Staff Present: Deb Thompson, Committee Secretary
Kathleen Williams, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 520, HB 429, 2/9/1999
Executive Action: HB 486; HB 487; HB 505

application for a non-consumptive use. Rep. Shockley said that was not a problem.

Rep. Raney asked about support for wetlands. Rep. Shockley replied much of the wetlands existed in part from irrigation. The valley was a desert during the Lewis and Clark expedition. He pointed out if there was no more water to irrigate there was no more water to make wetlands. If there were, they could do it with a 50 acre impoundment for beneficial use.

Rep. Ewer asked Mr. Stultz about the conflicting testimony and if it was his opinion that the basin was over subscribed or was the issue backlogged adjudication. Stultz replied the Bitterroot Basin had a history of conflict over water availability. This was not a question of a slow adjudication process but was a question of water availability and conflict over the water.

Rep. Tash pointed out in accordance with the Montana Water Use Act, irrigators were advised to file on every optimum drop of water.

Rep. Stovall asked about the concerns regarding livestock having priority during a drought over irrigation rights. Rep. Shockley replied this did not address federal water rights. Mike McGlenn, a water shed planner working with the Bitterroot Water Forum, described other basin closures in the state. When looking at the Bitterroot Basin, between existing filings and the fact that stock water is an exempt use. If it is a place where cows have grazed there is probably already a right there. Virtually everyone has already filed on their stock water. ***{Tape : 1; Side : B; Approx. Time Counter : 49.9 - 50.8}***

Closing by Sponsor: Rep. Shockley closed. He pointed out people with a weak right could file now. He pointed out domestic use had only 17 domestic use permits in the whole valley, after 1973. You cannot get a loan on a house by using surface water.

EXECUTIVE ACTION ON HOUSE BILL 486

Rep. Younkin **MOVED DO PASS**. She distributed an amendment that would address department approval of institutional controls. She **MOVED** the amendment. The question was called. The motion **PASSED** unanimously. **EXHIBIT(17)** ***{Tape : 2; Side : A}***

Rep. Younkin **MOVED DO PASS AS AMENDED**. She discussed institutional controls in general and they may have been perceived as a substitute for cleaning up the problem, and they are not. She referred to the statute that required that remedial

action be initiated to clean up and there was no change in this requirement. An institutional control will allow the polluter to take additional measures after the clean up to insure that public health and safety can be protected. ***{Tape : 2; Side : A; Approx. Time Counter : 6 - 7.9}***

Rep. Raney said he felt this could be used as a remedy. He saw an institutional control as a way to keep people off the land but it does not remedy or mitigate the situation. He noted that voluntary cleanup was the most hotly contested environmental issue last Session of the Legislature and a sunset provision was put on it to see if it worked. This bill would repeal the sunset which means that voluntary cleanup continues without anybody coming in to give a cost-benefit analysis or a record to show whether the program worked or not. ***{Tape : 2; Side : A; Approx. Time Counter : 10.5 - 13.3}***

Rep. Younkin replied that institutional control was not intended to mitigate pollution, rather it would mitigate the risk to public health. The requirement for clean up was still there.

Rep. Tuss said it was important to realize that regardless of how sophisticated the technology, there comes a point of diminishing return. It makes sense to alter the approach. Institutional controls are necessary to protect the public. She pointed out the Russian nuclear explosion. She talked about the golf course that was capped and had an alternative use for the foreseeable future, which was appropriate and reasonable. ***{Tape : 2; Side : A; Approx. Time Counter : 21.9}***

The question was called. The motion **PASSED** 14-6 with Reps. Raney, Gutche, Harper, Hurdle, Erickson and Eggers voting no.

EXECUTIVE ACTION ON HOUSE BILL 487

Rep. Younkin **MOVED DO PASS.** She explained the bill was related to CI-75. The question was called. The motion **PASSED** with Reps. Raney, Hurdle, Gutche, Eggers, Harper and Erickson voting no.

EXECUTIVE ACTION ON HOUSE BILL 505

Rep. Younkin **MOVED DO PASS** and **MOVED** the amendment. **EXHIBIT(18)** The question was called on the amendment. The motion **PASSED** unanimously. ***{Tape : 2; Side : A; Approx. Time Counter : 27.9}***

Rep. Gutche said she had amendments but wanted to defer action until she could address concerns.

EXHIBIT 17
DATE 2/12/99
HB 486

Amendments to House Bill No. 486
1st Reading Copy

Requested by Representative **Shiell Anderson**
For the House Natural Resources Committee

Prepared by Kathleen Williams
February 11, 1999

1. Page 12, line 5.
Strike: "institutional and"

2. Page 13, line 5.
Following: "may"
Insert: ", with department approval,"

3. Page 13, line 26.
Strike: "responsible"
Insert: "liable"

- END -

HOUSE OF REPRESENTATIVE
ROLL CALL

NATURAL RESOURCES COMMITTEE

DATE 2-12-99

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bill Tash, Chairman	✓		
Rep. Hal Harper, Vice Chair			✓
Rep. Cindy Younkin, Vice Chair	✓		
Rep. Rod Bitney			✓
Rep. Aubyn Curtiss	✓		
Rep. Rick Dale	✓		
Rep. Bill Eggers	✓		
Rep. Ron Erickson	✓		
Rep. David Ewer	✓		
Rep. Gail Gutsche	✓		
Rep. Joan Hurdle	✓		
Rep. Dan McGee	✓		
Rep. Douglas Mood	✓		
Rep. Karl Ohs	✓		
Rep. Scott Orr	✓		
Rep. Bob Raney	✓		
Rep. Bob Story	✓		
Rep. Jay Stovall	✓		
Rep. Carley Tuss	✓		
Rep. Doug Wagner	✓		

HOUSE STANDING COMMITTEE REPORT

February 15, 1999

Mr. Speaker:

We, your committee on **Natural Resources** report that **House Bill 486** (first reading copy -- white) **do pass as amended.**

Signed: Bill Tash
Representative Bill Tash, Chair

And, that such amendments read:

1. Page 12, line 5.
Strike: "institutional and"

2. Page 13, line 5.
Following: "may"
Insert: ", with department approval,"

3. Page 13, line 26.
Strike: "responsible"
Insert: "liable"

- END -

Committee Vote:
Yes 13, No 7.

371006SC.ham

MINUTES

MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN WILLIAM CRISMORE**, on March 12, 1999 at 3:15 P.M., in Room 405 Capitol.

ROLL CALL

Members Present:

Sen. William Crismore, Chairman (R)
Sen. Vicki Cocchiarella (D)
Sen. Mack Cole (R)
Sen. Lorents Grosfield (R)
Sen. Tom Keating (R)
Sen. Bea McCarthy (D)
Sen. Ken Miller (R)
Sen. Glenn Roush (D)
Sen. Mike Taylor (R)
Sen. Bill Wilson (D)

Members Excused: Sen. Dale Mahlum, Vice Chairman (R)

Members Absent: None.

Staff Present: Larry Mitchell, Legislative Branch
Jyl Scheel, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 340, 3/12/1999; HB 485, 3/12/1999; HB 486, 3/12/1999
Executive Action: SB 413

EXECUTIVE ACTION ON SB 413

Motion: **SEN. KEATING** moved that **SB 413 DO PASS.**

Motion: **SEN. KEATING** moved that **SB 413 AMENDMENTS SB041303.ATE BE ADOPTED. EXHIBIT(1).**

timber they want to cut? **Mr. Clinch** stated the discretion is within the Land Board now.

SENATOR CRISMORE questioned at the end of the ten years do they have to renew their lease or could one proceed with a timber sale at that point or other management? **Mr. Clinch** stated at the end of ten years, the restrictions would be removed and hopefully they would be renegotiating them. If this was a 10 - 15 acre deferral within a larger block area that was harvested, the likeliness of coming back and having a commercial operation at the end of ten years is not likely.

Closing by Sponsor:

REPRESENTATIVE SHIELL ANDERSON, HD 25, LIVINGSTON, stated he closed.

{Tape : 2; Side : A; Approx. Time Counter : 8.4 - 41; Comments : None.}

HEARING ON HB 486

Sponsor: **REPRESENTATIVE SHIELL ANDERSON, HD 25, LIVINGSTON**

Proponents:

Steve Wade, Pacific Steel and Recycling
Leo Berry, Burlington Northern and Santa Fe Railway Company and Rhodia, Inc.
Denise Mills, Remediation Division Administration, Department of Environmental Quality
Don Allen, Western Environmental Trade Association

Opponents:

Anne Hedges, Montana Environmental Information Center

Opening Statement by Sponsor:

REPRESENTATIVE SHIELL ANDERSON, HD 25, LIVINGSTON, stated **HB 486** addresses some cleaning up in the **Comprehensive Environmental Cleanup and Responsibility Act (CECRA)**. He referred to an amendment from **REP. BOOKOUT REINICKE.** He visited with her about the amendment and she decided not to pursue it so he hoped the committee would pass the bill unamended.

Proponents' Testimony:

Steve Wade, Pacific Steel and Recycling, spoke in support of **HB 486.** This bill does basically two things: 1) It removes the sunset provision currently in the voluntary cleanup act which allows property owners to clean up sites with **DEQ** oversight and get approval in a quicker and more cost efficient manner. 2) It inserts a definition of institutional controls into **CECRA.** The definition is required because they are seeking enforceability for institutional controls which are mechanisms to restrict use and access to property.

Leo Berry, Burlington Northern and Santa Fe Railway Company and Rhodia, Inc., spoke in support of **HB 486** as per **EXHIBIT(6).**

Denise Mills, Remediation Division Administration, Department of Environmental Quality, spoke in support of the bill as per **EXHIBIT(7).**

Don Allen, Western Environmental Trade Association, spoke in support of the bill. Over the past several years he has participated in a mixed interest group of people who have been involved in looking at the whole **CECRA** issue. The key word is to provide another option. The bill does that and he hopes the committee will look on it favorably.

Opponents' Testimony:

Anne Hedges, Montana Environmental Information Center, stated this bill needs a number of amendments to make it acceptable. The definition of institutional control in this bill is different than existing federal law. She recommends amending this bill to include the language on institutional controls found in **HB 331.** She referred to Page 11, line 29 of the bill and page 4, line 14 indicating there is a redundant section which says you must consider institutional controls giving due consideration to institutional controls. She feels it is sloppy and does nothing for the bill.

Her biggest concern has to do with the orphan share fund. When the fund was established it was meant to be a fund of last resort intended to be used for on the ground cleanup. This bill says this money will not be earmarked just for cleanup. She referred to page 3, line 17 where it says "unless affiliated by stock ownership". This says some people can be considered orphan share even though they have some type of financial interest in that property. On page 13, line 27 with the definition of orphan share and taking the stock ownership language, it says no one

would have to go after an insurance company. She is concerned the orphan share account will be depleted and no cleanup will have occurred. She encouraged the committee to no concur with the bill.

Questions from Committee Members and Responses: **None.**

Closing by Sponsor:

REPRESENTATIVE SHIELL ANDERSON, HD 25, LIVINGSTON, stated **Ms. Hedges** raised a number of issues that deserved a response. He did not sign the fiscal note because he was not sure that it was totally accurate. He did not think there was enough information to support it. This bill makes good sense as far as the institutional control. There was quite a long discussion on the House Floor and in the House Natural Resources Committee regarding institutional control. As a property owner you have a strong incentive to remove those institutional controls so the property is more marketable.

{Tape : 2; Side : B; Approx. Time Counter : 0 - 27.1; Comments : None.}

SENATE NATURAL RESOURCES
EXHIBIT NO. 6
DATE 3-12-99
BILL NO. HB 486

Testimony of Leo Berry
HB 486
On Behalf of the Burlington Northern and Santa Fe Railway Company and Rhodia, Inc.

HB 486 does 3 things:

1. Extends the Voluntary Cleanup Act passed in 1997 which expires January 1, 2001. This act speeds cleanups by encouraging landowners to voluntarily clean up sites. All plans must be approved by DEQ.
2. Creates a new type of institutional control which allows a landowner to restrict future use of property. After the cleanup progresses as far as practical, the landowner and DEQ can further protect public health by restricting how the property is used in the future. An institutional control can only be placed on the property if DEQ approves it. This is merely another option that will help facilitate projects like the Greenway between Butte and Fairmont Hot Springs or the golf course in Anaconda.
3. It provides a process to collect on bonds or insurance at sites where the operator is bankrupt or defunct.

HB 486 does not:

1. Change any clean-up standards or requirements.
2. Modify existing real property laws of the state relating to institutional controls for real property. The institutional control provisions of this bill are in addition to any other institutional controls that may be available under state law.

MONTANA SENATE
1999 LEGISLATURE
NATURAL RESOURCES COMMITTEE

ROLL CALL DATE March 12, 1999

NAME	PRESENT	ABSENT	EXCUSED
SEN. BILL CRISMORE, CHAIRMAN	X		
SEN. DALE MAHLUM, VICE CHAIRMAN			X
SEN. VICKI COCCHIARELLA	X		
SEN. MACK COLE	X		
SEN. LORENTS GROSFIELD	X		
SEN. TOM KEATING	X		
SEN. BEA MC CARTHY	X		
SEN. KEN MILLER	X		
SEN. GLENN ROUSH	X		
SEN. MIKE TAYLOR	X		
SEN. BILL WILSON	X		

DATE 3-12-99

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY: HB 298, HB 486, HB 485, HB 340

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
GREG HAHN	449-6071	MDT TRANSPORTATION	HB 340		
~~STEVE~~ Pilcher	442-8560	ARCO	HB486	X	
Bob Brown	442-2419	CFAC	"	✓	
~~HB 485 HB 486~~					
~~Denise R. Baker~~	457-9143	MT Sierra Club	HB485		X
Denise Mills	4-3006	DEQ	HB486	✓	
~~Joe Russell~~	758-5828	FLATHEAD CC HEALTH			X
Janet Ellis	443-3949	MT Audubon	HB485		X
Anne Hedges	443-2520	MEIC	HB 486		X
Joe LAMSON	4-7094	OPI	HB485	X	
MARC Simonich	444-2544	DEQ	HB298		X
Steve Wade	443-6820	Pacific Hide & Fur	HB486	X	
Joe Kerwin	4-5376	Sec. of State	HB 485	X	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE 3-12-99

SENATE COMMITTEE ON Nat. Resources

BILLS BEING HEARD TODAY:

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
W.P. LAVALA	586-4452	MARLS	340	X	
Steve Swadek	443-4032	MT Assoc. of Realtors	HB 298	X	
Keith Olson	752-3168	MT. Logging Assn	485	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE 3/12/09

SENATE COMMITTEE ON Nat. Resources

BILLS BEING HEARD TODAY:

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
Dan Allen	449-5541	WETA	HR 485 HR 486	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

MINUTES

MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN WILLIAM CRISMORE**, on March 22, 1999 at 3:10 P.M., in Room 405 Capitol.

ROLL CALL

Members Present:

Sen. William Crismore, Chairman (R)
Sen. Dale Mahlum, Vice Chairman (R)
Sen. Vicki Cocchiarella (D)
Sen. Mack Cole (R)
Sen. Lorents Grosfield (R)
Sen. Tom Keating (R)
Sen. Bea McCarthy (D)
Sen. Ken Miller (R)
Sen. Glenn Roush (D)
Sen. Mike Taylor (R)
Sen. Bill Wilson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Larry Mitchell, Legislative Branch
Jyl Scheel, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: None
Executive Action: HB 340; HB 486; HB 298

EXECUTIVE ACTION ON HB 340

Motion: **SEN. COCCHIARELLA** moved that **HB 340 BE CONCURRED IN.**

SENATOR McCARTHY questioned if the sponsor was aware of the financial impact? **SENATOR CRISMORE** said he was not certain.

SENATOR COLE stated this not only included **MDT** but included counties roads also. He asked if fiscal impact information could be obtained for the counties as well.

SENATOR MAHLUM requested **Mr. Mitchell** obtain that information for the committee.

SENATOR COCCHIARELLA stated the Fiscal Note says this is in the Governor's Budget. She asked **Mr. Mitchell** to find out if it is included in **HB 2** or if it goes to appropriations.

SENATOR MAHLUM questioned what would have happened to **MTD** had the committee passed this bill today without knowledge of the fiscal impact, would that have been a problem? **Mr. Hahn** stated yes.

SENATOR GROSFIELD questioned what they do now instead of filing corner records? **Mr. Hahn** stated they replace public survey corners and private property founding corners now which is part of what 76-3-209 MCA talks about. This bill says they will replace any references or any other pins other than property corners and public surveys.

{Tape : 1; Side : A; Approx. Time Counter : 0 - 9.8; Comments : None.}

EXECUTIVE ACTION ON HB 486

Motion: **SEN. COLE** moved that **HB 486 BE CONCURRED IN.**

Discussion:

SENATOR TAYLOR requested an explanation of page 3, lines 15-18, "unless affiliated by a stock ownership". **Mr. Mitchell** stated there has to be a direct connection between a parent company and the company that perhaps is involved in the cleanup. Unless there is a direct affiliation by stock ownership, that site would become an orphan share if the smaller of the companies was bankrupt. **SEN. TAYLOR** stated what if he owned a piece of ground and leased the ground to **SEN. MAHLUM** who contaminates the ground

with his project. Because the cleanup will cost $1 million dollars and **SEN. MAHLUM'S** business is only worth $200,000, he declares bankruptcy and leaves. Does it revert back to the owner that leased the land to be responsible for the cleanup? Does this amendment say they are responsible or not? **Mr. Mitchell** stated the owner of the property would still be responsible. The amendment gets more to the situation where **TAYLOR** is Company A, **MAHLUM** is Company B and **GROSFIELD** is Company C. **TAYLOR** owns all three. **GROSFIELD'S** company pollutes and goes bankrupt. The middle company disappears and there is no stock connection between **TAYLOR** and this company any further. **GROSFIELD'S** company becomes an orphan share even though **TAYLOR** originally had owned it. By getting rid of the middle company, there is not stock connection between the three.

SENATOR WILSON stated he had an amendment to offer to strike that language.

SENATOR GROSFIELD asked for further clarification of the stock ownership issue. He questioned if that is how it works in the example just given? **Mr. Berry** stated there were two examples given. The first example being where **TAYLOR** leased the property to **MAHLUM** who polluted the property and left. Under Super Fund law, **TAYLOR** is responsible for cleanup. After cleanup, he could apply to the Orphan Share to be reimbursed for **MAHLUM'S** portion of that liability. Usually the lessor is responsible for about one-third and the lessee is responsible for two-thirds. The state establishes an allocation process where a variety of factors are considered and the shares could change as a result of those factors. **SEN. GROSFIELD** questioned is that under current law? **Mr. Berry** stated that is under current law and it does not change under current law. The reason for the amended bill is the Department determined under current law to strike the new language. The change was made to be sure there was a stock relationship between those parties and not an insurance contract relationship.

In the situation where you have tiered corporations and the bottom tier goes bankrupt there is a contractual relationship under Montana law between the three corporations. Under Super Fund, the parent company is liable and has to do the cleanup. It could, under this law, apply for reimbursement under the orphan share but it has to go through that allocation process. If there was a stock ownership relationship there and was actually in control of that lower company, it's allocation would likely be zero. Technically it could be eligible for an orphan share but once you go through the allocation process, he thinks it would be zero.

SENATOR WILSON questioned if there were any holes to be shot in what **Mr. Berry** said? **Bill Curley, Acting Chief Remediation Counsel for the Department of Environmental Quality**, stated in the example **Mr. Berry** explained what triggered the need for the bill amendment. **TAYLOR** as owner of the property has a claim against **MAHLUM'S** company who is now bankrupt, so the owner will not get anything out of it. His company is an orphan if it is not affiliated with any viable person. The Department made the determination that if he had insurance coverage which would pay his share, the insurance coverage would have to pay first before looking to the orphan share for reimbursement. The bill as amended would change that so the owner could do an allocation and receive reimbursement from the orphan share. If the owner did not collect insurance, then the Department representing the orphan share could go after the insurance.

SENATOR WILSON stated the way it was explained to him was this new language would create situations where the orphan share account could be gone after a whole lot more than what was originally proposed. Who is holding the bag? **Mr. Curley** stated he had alluded to two different questions, one being are you letting someone off the hook and the second being who is holding the bag? There are two different answers to both questions. He is not sure the insurer is being let off the hook by the revisions to current law in the bill. It does change the burden of who would have to go after the insurer or another party. **SEN. WILSON** stated so the big corporation with this new language could effectively end up in a situation where it is not their game and they do not have to go after the insurance company. The bankrupt polluter is out and not going after the insurance company. Since there is no direct stock ownership, the parent company is not going after the insurance. Then it reverts back to the orphan share account? **Mr. Curley** said that is basically correct.

SENATOR COCCHIARELLA stated the way **SEN. WILSON** just explained this is the way she understood how this would work. She thought BN-Santa Fe would be off the hook for anything and **DEQ** would have to go through the suing and go after them. **Leo Berry** stated that was not the case. BN would be responsible or any landowner would be responsible for the cleanup. The landowner can then apply for a reimbursement from the orphan share to cover this bankrupt parties allocation. The more you were involved in the activity, the less you will get back. **SENATOR COCCHIARELLA** questioned where the insurance company was in this? **Mr. Berry** stated at the back of the bill, on the bottom of page 13, allows the liable party who had to clean it up to sue the insurance company or on the next page, it authorizes the Department to sue the insurance company. If any money is recovered from the insurance company,

it gets credited back to the orphan share. They would not get to recover twice.

SENATOR TAYLOR referred to page 3, line 17 and 18, and stated this is a policy decision as he understands it, whether the state should collect the money from the insurance company or the company should go after the money from the insurance company. If this amended bill is accepted, it says the company is not responsible for collecting the money, but the state is. If you want the state to collect the money and not the company, you accept this amended bill as written. If you think the company should collect the money from the insurance company the amendment would be taken out. The company will still be reimbursed from the orphan share for the money they have to expend to collect from the insurance company? **Mr. Berry** said page 13 states who is going to sue the insurance company. Either the Department or the private party can sue the insurance company under this bill. If they sue for $500,000 and it costs them $100,000 to pursue litigation, $400,000 is credited back to the orphan share. The policy decision argument he has heard is who should be doing the suing and do you get to deduct legal fees from that recovery? If a private party takes that on or if the state takes that on they should be reimbursed because they could lose and be out $100,000.

This issue is a little bit different. This goes to determining who qualifies to be an orphan not who is going to sue the insurance company but who will qualify to be an orphan. As he explained before, by changing the definition of orphan share, corporations are qualified to be an orphan. If you look at other parts of the law and you allocate out what they would get back from the orphan share, if they are the senior corporation, he estimates they would get zero back.

SENATOR GROSFIELD questioned why do we want to do this? **Mr. Berry** stated because of the issue where the Department determines that an affiliate is an insurance company.

SENATOR COCCHIARELLA asked for clarification on "we had a company". Is it a BN company? **Mr. Berry** stated it was the Kalispell Pole Site where BN leased property to the Kalispell Pole Company who operated on site for many years, went out of business and the only one left is the widow of the guy who operated it. They had some old insurance policies. They applied to the orphan share. They started dealing with the company and concluded they had no assets. The only assets are the widow's. The attorney had two choices, either apply to the orphan share or sue the widow. No one wanted to sue the widow. They applied to the orphan share and the Department said it was not an orphan. There are old insurance policies and they would have to make a

claim against them. The insurance company denied all the coverage. They went back to the Department and asked if it was an orphan now because there is no money here? The Department said no, they may still be liable under the terms of the policies. He then asked if the Department was going sue the insurance company. They said no. At that point they were stymied because they would not sue the insurance company but they would not declare it to be an orphan either. He withdrew the petition for the orphan share and he filed an action against Kalispell Pole Company in Federal Court in Missoula. They have confessed liability for contaminating the site. They will assign their rights under their insurance policies to the law firm and they will then sue the insurance company. This is trying to correct that situation so they don't have to go around in a circle. If an insurance carrier is not an affiliate of a company, that is a separate contractual arrangement. An affiliate is a sister company of some sort where there is a stock relationship. If you have subsidiaries there is a stock relationship, you do not want to let the big guy out.

SENATOR McCARTHY questioned if the widow was absolved of any liability? **Mr. Berry** stated the case is not finished yet. The law firm's agreement with Kalispell Pole is they will not go after any of the individual owners of the widow if they assign them the policy. All he want to do with this language is make sure that does not have to happen again.

SENATOR MAHLUM questioned how long this had been going on? **Mr. Berry** stated two to three years.

SENATOR WILSON stated it is a $8,670,000 estimated cleanup cost, is that correct? **Mr. Berry** stated it is but this bill does not really affect that one way or another. This bill is not retroactive. **SEN. WILSON** said so that is what you did under orphan share the way it used to be defined. What would have happened under this new language? **Mr. Berry** stated under existing law if it is an $8 million dollar cleanup and $2 to $3 million is recovered from the insurance company, the rest would qualify as an orphan. It is not changing that relationship. Under this bill any of those recovered monies would be credited against the orphan share so double recovery would not be possible.

SENATOR GROSFIELD asked her concern? **Anne Hedges, Montana Environmental Information Center,** stated her concern was that she was one of the individuals who participated in the consensus process that took two years to develop this language. That consensus language is being changed from what was agreed upon. This language means that no one has to go after the insurance

company. When reading this in conjunction with page 13 at the bottom, you allow the financially responsible party to be gone after by the potentially responsible person and say the Department 'may' go after the insurance company. Nobody 'has' to. If you read this in conjunction with the Fiscal Note, it says litigation will not be pursued by the Department if it is not going to be beneficial. That is not the purpose of the orphan share. The orphan share fund was supposed to be a fund of last resort, it was always to go to on the ground cleanup. She does not disagree to allow recovery of attorney's fees from the fund indirectly but she does disagree that, with the combination of these two languages, no one will go after the insurance company.

SENATOR GROSFIELD asked if the Department is not going to sue? **Denise Mills, DEQ,** stated they put a qualification in the Fiscal Note that says they would essentially make an assessment of the viability of pursuing the insurance policy to recover the orphan share process if reimbursed. There may be situations where they would either break even or the cost of litigation would outweigh the benefit they might gain from pursuing that. **SEN. GROSFIELD** said they would not sue unless it looked like the Department would come out ahead and if you did come out ahead you would? **Ms. Mills** stated that was correct.

SENATOR KEATING questioned if the plaintiff loses, they cannot ask for reimbursement out of the orphan share for remedial action costs, can they? **Ms. Mills** stated that is not quite correct. The policy question is that the amendments proposed in this bill would mean if the owner has gone in to do the cleanup because the lessee has left, that is a two-third allocation that is identified as an orphan share. The owner has already been reimbursed for those costs from the orphan share fund and then either he or the Department, under these amendments, would then pursue the insurance policy to recover those remedial action costs. If the plaintiff in this case, is successful in recovering those costs, all the attorney fees would be reimbursed from the orphan share fund. If the plaintiff is unsuccessful, the orphan share reimbursement has already been made. **SEN. KEATING** questioned the loser is not able to come back to recover legal costs from the orphan share? **Ms. Mills** said from her understanding of the bill she thought that was correct.

{Tape : 1; Side : A; Approx. Time Counter : 9.8 - 45; Comments : None.}

SENATOR COCCHIARELLA questioned what is the impact of the bill, as it is without amendment, having the Department not pursuing some situations and pursuing others? **Mark Simonich, Director,**

DEQ, said this is really a policy call for the legislature to make. There is always a judgement call going to be made by parties on the other side at any time as to whether that insurance policy is viable whether there is a real opportunity to win or and whether there is sufficient policy there to make it worthwhile to go after. This bill shifts the burden somewhat. It shifts the burden to the state and puts them in a more active role. It allows other responsible parties to come in to pursue a cost allocation and then have the state make that determination whether or not the state wants to pursue the insurance company. On balance, when you get through the whole thing, it should not make a great deal of difference to the orphan share fund itself. Ultimately if they are doing their job best they can, there should be very little difference to the fund but it does begin to shift some of the burden to the state to have the state be more proactive in potentially pursuing any of those potentially liable or financial responsible parties out there such as insurance companies.

Motion: **SEN. WILSON** moved that **HB 486 AMENDMENT #HB048602.ALM BE ADOPTED. EXHIBIT(2).**

Discussion:

SENATOR WILSON stated on page 3, line 17, this amendment proposes to strike "an affiliate of" and insert "affiliated with" and strike "unless affiliated by stock ownership". The amendment puts it back to the original law developed under a consensus council process. He does not believe that just because there is not an affiliation by stock ownership that anyone should be let out of the process of going after an insurance company to rectify the environmental damage.

SENATOR KEATING stated he needs an explanation of the term affiliated. How close a relationship is that? **Mr. Curley** stated in existing law the Department's interpretation was it means there is a contractual relationship that makes the affiliate responsible for the legal liability of the principal.

SENATOR KEATING stated in the case between the railroad and the widow, since the pole company is defunct, is the railroad on the hook because of their affiliation with the widow? **Mr. Curley** stated the railroad is on the hook because, under the basic statutory liability scheme under **CECRA**, it is the owner of the property and the owner of the property is one of the liable persons. How much of the liability they have to assume depends on their relationship to the property and historically what has happened. This does not change that. If they have to do the

cleanup, it changes whether they can go after the orphan share to be reimbursed for the defunct party's share or whether they have to look to the insurer first.

SENATOR KEATING questioned is the insurance company affiliated with the widow? **Mr. Curley** stated a determination was made that the insurance company was affiliated with the pole plant corporation which was the liable party. The widow is not actually a liable party.

SENATOR GROSFIELD stated in a similar case they would not be allowed to look at the Orphan Share Fund until they exhaust the remedies with the insurance company? **Mr. Curley** stated if it appeared there was viable insurance coverage, that was the determination the Department made. **SEN. GROSFIELD** stated if the bill passes, the agencies will be a position, on page 13, of looking at the insurance and doing a cost analysis to determine what money they will pay. If the language is changed the burden is shifted to the company so the company will go through the same analysis. It is a catch 22 because they cannot use the orphan share account until they have gone after their insurance. Is that correct? **Mr. Curley** stated the Department would have to make a fair judgement also as to if there is viable coverage so their determination on the insurance coverage would be the same in either case. **SEN. GROSFIELD** stated he felt more comfortable with the Department making the decision and not having this circular run around that we will end up with without it if he understands this right. He will oppose the amendment.

SENATOR WILSON questioned how big a deal is this? **Mr. Berry** stated stated in this case they are forced to sue the widow. There is no contractual relationship between BN and the insurance company so they have to sue the widow and have her sign her rights over, though the Department has not done a real analysis of whether that is a viable action. It is obvious that the committee is confused as the bill has more important parts to it than this particular item and he suggests the committee accept **SEN. WILSON'S** amendment to solve the issue and they will come back and try to address it next time. It is a viable issue but obviously needs more work to make everyone feel comfortable.

Vote: Motion that **AMENDMENTS HB048602.ALM BE ADOPTED failed 5-5.**

{Tape : 1; Side : B; Approx. Time Counter : 0 - 13.5; Comments : None.}

SENATOR WILSON stated **REP. BOOKOUT** is in attendance and had received permission from **CHAIRMAN CRISMORE** to address the committee and explain her amendments.

Motion: **SEN. WILSON** moved that the **BOOKOUT HB 486 AMENDMENTS HB048601.AMV BE ADOPTED.**

Discussion:

REPRESENTATIVE SYLVIA BOOKOUT REINICKE, HD 71, ALBERTON, stated at the hearing **REP. ANDERSON** did not want these amendments to go on the bill because then it would have to go back to the Floor for another debate. She told him the committee had the amendments and to leave it up to the committee and he could say whatever he wanted to against them. She did not tell him to say that she had changed her mind about wanting them to be considered. She presented her amendments as per **EXHIBIT(3).** As explained to her by **Greg Petesch,** the Federal Super Fund law will acknowledge when the state has a law that says the property owner is not liable for condemnation. As far as she knows, this little bit of language is the only personal property rights protection law we will pass this session. She encouraged the committee to join her in doing something for the people back home.

SENATOR MAHLUM questioned if this was for the Yellowstone Pipe Line? **REP. REINICKE** stated yes.

SENATOR McCARTHY stated **REP. TUSS** has a resolution about eminent domain and stream related issues. **REP. REINICKE** stated that is a study which is still alive but she was referring to something going into current law now in her previous comment.

SENATOR MILLER questioned if this was not a major part of a bill that already existed in the House? **REP. REINICKE** stated she had two eminent domain bills before the House Natural Resource Committee which were tabled, hence **REP. TUSS** came up with the idea for a study. **SENATOR MILLER** questioned this is not basically what one of the bills were that was tabled in House Business and Labor? **REP. REINICKE** stated it is part of it. **SEN. MILLER** stated he knows that if one bill dies in the House, the same bill cannot proceed forward in the other House and he wonders how that applies to amendments? If this is basically the bill and it dies in the House, the committee has the authority to stick it on another bill in the Senate and run it through? **REP. REINICKE** stated this is a small part of the bill.

SENATOR GROSFIELD stated the title of **HB 486** talks about institutional controls and orphan shares and now we are putting condemnation into it. Are not we straying pretty far from the title of the bill? **Mr. Mitchell** stated basically this amendment seeks to change the liability section of **CECRA** which is amended

in this bill. He felt it was on the edge but felt also that it was within the title of this particular bill.

SENATOR GROSFIELD said he had signed **REP. TUSS'** resolution as he felt it would be good to have a study on this whole eminent domain issue. There is a lot of confusion out there and he feels the guidelines in the statutes are maybe not what they ought to be. He would support a study but he did not feel he could support this amendment to put that into this bill at this time.

SENATOR COLE stated there have also been some bills that had an affect on the Cenex Pipe Line East of Billings, would that be involved in this too? **Mr. Mitchell** stated whenever a property has been condemned for the purpose of an easement, should that condemnation or the use of that property that has been condemned result in a release of a hazardous substance subjected to remediation under **CECRA**, this amendment would apply. It would basically hold the person whose property has been condemned not liable for the remediation of that release.

SENATOR KEATING he is trying to figure out authorizing a person harmed by a release to sue to recover damages and be awarded attorneys fees. Can't the person damaged now sue? Why is this in this section? **Mr. Mitchell** stated it is his belief they can. **Mr. Curley** stated there is a contribution action under **CECRA** by which a person normally would be able to sue the other responsible parties for the contribution. You would assume in a pipeline leak, the pipeline would be responsible for 100% of the costs and the landowner should be allocated zero. **SEN. KEATING** questioned what about the landowner who's land off the easement was damaged? Can they not sue? **Mr. Curley** stated if they incur any costs as a result of the damage in cleaning it up they can then sue the other responsible parties to recover those costs. **SEN. KEATING** stated he just did not see a need for this in the law.

Vote: Motion that **HB 486 AMENDMENTS HB048601.AMV BE ADOPTED failed 3-6 in a Roll Call Vote** with **SENATORS COLE, GROSFIELD, KEATING, McCARTHY, MILLER AND ROUSH voting no.**

Motion: **SEN. MCCARTHY** moved that **HB 486 AMENDMENTS HB048601.ALM BE ADOPTED. EXHIBIT(4).**

Vote: Motion that **HB 486 AMENDMENTS HB048601.ALM BE ADOPTED carried 9-0.**

Motion/Vote: **SEN. COLE** moved that **HB 486 BE CONCURRED IN AS AMENDED. Motion carried 8-1 with Wilson voting no.**

{Tape : 1; Side : B; Approx. Time Counter : 13.5 - 30.2; Comments : None.}

EXECUTIVE ACTION ON HB 298

Motion: **SEN. MILLER** moved that **HB 298 BE CONCURRED IN.**

Discussion:

SENATOR MILLER stated he had contacted **Roger Perkins**, a hydrologist in Laurel who had worked on the subdivision that brought this legislation forward, and he said he thought this bill would accomplish what was trying to be accomplished. With his expert advice he will support the bill.

SENATOR McCARTHY stated she wanted to be sure she understood the bill on page 2, line 19. **Mr. Mitchell** stated this gets to the types of things **DEQ** can review in terms of approving subdivision plats, in terms of water and sewage, and gets to the issue of requiring an adequate supply in terms of quality, quantity and dependability of water. It is more to the issue of dependability. If the Department determines that because of the dependability issue with water supply or rejects the subdivision, then the applicant has to come back with an alternative. Some of those alternatives come back to the Department as saying they will haul water and use cisterns instead. This bill will not allow the Department to require a cistern be installed if there is an alternative water supply elsewhere where water can be hauled within a reasonable distance.

REPRESENTATIVE FUCHS stated the word "hauled" comes from the way the rules are written. He is trying to take away the authority of the Department to require a cistern be used if an alternative water supply is available. Currently, the local reviewing authority is not able to handle it. If the bill is not passed then money needs to be appropriated for another 12-15 field people for the Department to ensure compliance.

SENATOR GROSFIELD questioned is Title 76 Chapter 4, Part 1 subdivision law? **John North, Chief Legal Counsel, DEQ**, stated yes, it is sanitation subdivision law. **SEN. GROSFIELD** questioned are we dealing with rulemaking authority of the Department with

SENATE NATURAL RESOURCES
EXHIBIT NO. 2
DATE 3-22-99
BILL NO. HB 486

Amendments to House Bill No. 486
3rd Reading Copy

Requested by Senator Bill Wilson

For the Senate Natural Resources Committee

Prepared by Larry Mitchell
March 22, 1999 (1:48PM)

1. Page 3, line 17 and line 18.
Strike: "an affiliate of" on line 17
Insert: "affiliated with"
Strike: ", unless affiliated by stock ownership"

- END -

edited

SENATE NATURAL RESOURCES
EXHIBIT NO. 3
DATE 3-22-99
BILL NO. HB486

Amendments to House Bill No. 486
3rd Reading Copy

Requested by Representative Sylvia Bookout-Reinicke

For the Senate Natural Resources Committee

Prepared by Mary Vandenbosch
March 12, 1999 (1:39PM)

1. Title, line 10.
Following: "PARTY;"
Insert: "ESTABLISHING AN EXCLUSION FROM LIABILITY FOR A PERSON WHOSE PROPERTY IS CONDEMNED FOR AN EASEMENT; AUTHORIZING A PERSON HARMED BY A RELEASE OF A HAZARDOUS OR DELETERIOUS SUBSTANCE TO SUE TO RECOVER DAMAGES; AUTHORIZING THE COURT TO AWARD ATTORNEY FEES TO THE PREVAILING PARTY IN A CITIZEN'S SUIT;"
Strike: "AND"
Following: "75-10-721,"
Insert: "75-10-724, AND 75-10-726,"

2. Page 9, line 19.
Following: "substance"
Insert: "; or

(d) the person owns property that has been condemned for an easement, provided that the following conditions are met:

(i) the person did not cause, contribute to, or exacerbate the release or threatened release of any hazardous or deleterious substance through any act or omission;

(ii) at the time that the property was condemned, there were no visible indications of contamination on the surface of the real property;

(iii) the person cooperates with the department and all persons conducting department-approved remedial actions on the property, including granting access and complying with and implementing all required institutional controls; and

(iv) there is no other basis of liability under subsection (1) for the owner for the release or threatened release of a hazardous or deleterious substance"

3. Page 9, line 21.

Strike: "(7)(c)"
Insert: "(7)(d)"

4. Page 13.
Following: line 4
Insert: "Section 4. Section 75-10-724, MCA, is amended to read:

"75-10-724. Private right of action. (1) Any person who receives notice under 75-10-711, who is held jointly and severally liable under 75-10-715, or who initiates a voluntary cleanup under the provisions of 75-10-730 through 75-10-738 may bring a private right of action, including a claim for contribution or declaratory relief, against any other person who is liable or potentially liable under 75-10-715 for the recovery of remedial action costs. In resolving contribution claims, the court shall allocate remedial action costs among the liable persons based on the factors set out in 75-10-750.

(2) Any person who incurs bodily injury or property damage as a result of a release of a hazardous or deleterious substance may bring an action to recover damages. The court shall award the prevailing party reasonable costs and attorney fees."

{*Internal References to 75-10-724: None.*}"

Insert: "Section 5. Section 75-10-726, MCA, is amended to read:

"75-10-726. ~~Citizens~~ Citizen's suit. (1) Any person may commence a civil action to compel compliance by any liable or potentially liable person under 75-10-715 alleged to be in violation of a rule, notice letter, order, or department-approved remedial action required pursuant to a notice letter or order under this chapter.

(2) At least 60 days before commencing the action, the person shall give notice of intent to sue to all liable or potentially liable persons under 75-10-715 who are contemplated to be defendants in the proposed action.

(3) An action may not be commenced under subsection (1) if the liable or potentially liable person is diligently coming into compliance with the rule, notice letter, order, or department-approved remedial action plan or if the department has commenced and is diligently prosecuting an action to require compliance with the rule, notice letter, order, or department-approved remedial action plan.

(4) The court shall award reasonable costs and attorney fees to the prevailing party in a civil action brought under this section."

{*Internal References to 75-10-726: None.*}"
Renumber: subsequent sections

5. Page 14, lines 6 and 8.
Strike: "4 and 5" on line 6.
Insert: "6 and 7"
Strike: "4 and 5" on line 8
Insert: "6 and 7"

- END -

SENATE NATURAL RESOURCES
EXHIBIT NO. 4
DATE 3-22-99
BILL NO. HB486

Amendments to House Bill No. 486
3rd Reading Copy

Requested by Representative Shiell Anderson

For the House Natural Resources Committee

Prepared by Larry Mitchell
March 22, 1999 (1:47PM)

1. Title, page 1, line 11 through line 12.
Following: "1995;"
Strike: the remainder of lines 11 and 12
Insert: "AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

2. Page 14 lines 10 through 18.
Strike: sections 8 and 9 in their entirety
Insert: "NEW SECTION. **Section 8. {standard} Effective date.** [This act] is effective on passage and approval."

- END -

MONTANA SENATE
1999 LEGISLATURE
NATURAL RESOURCES COMMITTEE

ROLL CALL DATE March 22, 1999

NAME	PRESENT	ABSENT	EXCUSED
SEN. BILL CRISMORE, CHAIRMAN	X		
SEN. DALE MAHLUM, VICE CHAIRMAN	X		
SEN. VICKI COCCHIARELLA	X		
SEN. MACK COLE	X		
SEN. LORENTS GROSFIELD	X		
SEN. TOM KEATING	X		
SEN. BEA MC CARTHY	X		
SEN. KEN MILLER	X		
SEN. GLENN ROUSH	X		
SEN. MIKE TAYLOR	X		
SEN. BILL WILSON	X		

SENATE STANDING COMMITTEE REPORT

March 23, 1999

Mr. President:

We, your committee on **Natural Resources** report that **House Bill 486** (third reading copy -- blue) **be concurred in as amended.**

Signed: Wm L Crismore
Senator William Crismore, Chair

To be carried by Senator Bea McCarthy

And, that such amendments read:

1. Title, page 1, line 11 through line 12.
Following: "1995;"
Strike: the remainder of lines 11 and 12
Insert: "AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

2. Page 14 lines 10 through 18.
Strike: sections 8 and 9 in their entirety
Insert: "NEW SECTION. **Section 8. Effective date.** [This act] is effective on passage and approval."

- END -

Committee Vote:
Yes 8, No 1.

651018SC.srf

MONTANA SENATE
1999 LEGISLATURE
NATURAL RESOURCES COMMITTEE
ROLL CALL VOTE

DATE 3/22/99 BILL NO. HB 486 NUMBER 1

MOTION: HB 486 amendment HB048602.alm

NAME	AYE	NO
SEN. BILL CRISMORE, CHAIRMAN		
SEN. DALE MAHLUM, VICE CHAIRMAN		X
SEN. VICKI COCCIARELLA	X	
SEN. MACK COLE		X
SEN. LORENTS GROSFIELD		X
SEN. TOM KEATING		X
SEN. BEA MC CARTHY	X	
SEN. KEN MILLER		X
SEN. GLENN ROUSH	X	
SEN. MIKE TAYLOR	X	
SEN. BILL WILSON	X	

MONTANA SENATE
1999 LEGISLATURE
NATURAL RESOURCES COMMITTEE
ROLL CALL VOTE

DATE 3-22-98 BILL NO. HB 486 NUMBER 2

MOTION: HB 486 amendments HB048601.amv

NAME	AYE	NO
SEN. BILL CRISMORE, CHAIRMAN		
SEN. DALE MAHLUM, VICE CHAIRMAN	X	
SEN. VICKI COCCIARELLA		
SEN. MACK COLE		X
SEN. LORENTS GROSFIELD		X
SEN. TOM KEATING		X
SEN. BEA MC CARTHY		X
SEN. KEN MILLER		X
SEN. GLENN ROUSH		X
SEN. MIKE TAYLOR	X	
SEN. BILL WILSON	X	

MONTANA SENATE
1999 LEGISLATURE
NATURAL RESOURCES COMMITTEE
ROLL CALL VOTE

DATE 3-22-99 BILL NO. HB 486 NUMBER 3

MOTION: HB 486 Be Concurred In.

NAME	AYE	NO
SEN. BILL CRISMORE, CHAIRMAN		
SEN. DALE MAHLUM, VICE CHAIRMAN	X	
SEN. VICKI COCCIARELLA		
SEN. MACK COLE	X	
SEN. LORENTS GROSFIELD	X	
SEN. TOM KEATING	X	
SEN. BEA MC CARTHY	X	
SEN. KEN MILLER	X	
SEN. GLENN ROUSH	X	
SEN. MIKE TAYLOR	X	
SEN. BILL WILSON		X

1999 Montana Legislature

About Bill -- Links

HOUSE BILL NO. 486

INTRODUCED BY S. ANDERSON, L. GROSFIELD, S. GALLUS, J. HARP, D. HARRINGTON, B. MCCARTHY, K. OHS, M. WATERMAN, C. YOUNKIN

AN ACT DEFINING "INSTITUTIONAL CONTROL"; CLARIFYING THE DEFINITION OF "ORPHAN SHARE"; REQUIRING THAT THE DEPARTMENT OF ENVIRONMENTAL QUALITY GIVE DUE CONSIDERATION TO INSTITUTIONAL CONTROLS IN SELECTING REMEDIAL ACTIONS; ESTABLISHING AN INSTITUTIONAL CONTROL PROCESS; PROPORTIONATELY REDUCING THE ORPHAN SHARE IF A POTENTIALLY RESPONSIBLE PERSON RECOVERS REMEDIAL ACTION COSTS FROM A FINANCIALLY RESPONSIBLE PARTY; AMENDING SECTIONS 75-10-701, 75-10-715, AND 75-10-721, MCA; REPEALING SECTION 27, CHAPTER 584, LAWS OF 1995; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 75-10-701, MCA, is amended to read:

"75-10-701. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

(1) "Department" means the department of environmental quality provided for in 2-15-3501.

(2) "Director" means the director of the department.

(3) "Environment" means any surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the state of Montana or under the jurisdiction of the state of Montana.

(4) (a) "Facility" means:

(i) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft; or

(ii) any site or area where a hazardous or deleterious substance has been deposited, stored, disposed of, placed, or otherwise come to be located.

(b) The term does not include any consumer product in consumer use.

(5) "Fiduciary" means a trustee, executor, administrator, personal representative, custodian, conservator, guardian, or receiver acting or holding property for the exclusive benefit of another person. The term does not include:

(a) a person who has previously owned or operated the property in a nonfiduciary capacity; or

(b) a person acting as fiduciary with respect to a trust or other fiduciary estate that has no objectively reasonable or substantial purpose apart from avoidance of or limitation of liability under this part. For the purposes of 75-10-715(9), the term does not include the state, a state agency, or a political subdivision of the state acting as trustee of natural resources within the state of Montana.

(6) "Foreclosure" means acquisition of title to property through foreclosure, purchase at foreclosure sale, assignment or acquisition of title in lieu of foreclosure, repossession in the case of a lease financing transaction, or acquisition of a right to title or other agreement in full or partial settlement of a loan obligation.

(7) "Fund" means the environmental quality protection fund established in 75-10-704.

(8) "Hazardous or deleterious substance" means a substance that because of its quantity, concentration, or physical, chemical, or infectious characteristics may pose an imminent and substantial threat to public health, safety, or welfare or the environment and is:

(a) a substance that is defined as a hazardous substance by section 101(14) of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601(14), as amended;

(b) a substance identified by the administrator of the United States environmental protection agency as a hazardous substance pursuant to section 102 of CERCLA, 42 U.S.C. 9602, as amended;

(c) a substance that is defined as a hazardous waste pursuant to section 1004(5) of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6903(5), as amended, including a substance listed or identified in 40 CFR 261; or

(d) any petroleum product.

(9) "Household" means single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, day-use recreational areas, or similar structures or areas.

(10) "Household refuse" means garbage, trash, and sanitary wastes in septic tanks that are derived from a household.

(11) "Institutional control" means a restriction on the use of real property that mitigates the risk posed to public health, safety, and welfare and the environment. Institutional controls include but are not limited to:

(a) deed restrictions;

(b) easements;

(c) reservations;

(d) convenants, either restrictive or affirmative; and

(e) other mechanisms or physical restrictions for controlling present and future land use, including controlled ground water areas, that are placed upon real property to mitigate the risk to public health, safety, and welfare and the environment.

~~(11)~~(12) "Natural resources" means land, fish, wildlife, biota, air, surface water, ground water, drinking water supplies, and any other resources within the state of Montana owned, managed, held in trust, or otherwise controlled by or appertaining to the state of Montana or a political subdivision of the state.

~~(12)~~(13) "Orphan share" means the percentage share of remedial action costs for a facility that is attributable, under the procedures in 75-10-742 through 75-10-752, to identified but bankrupt or defunct persons who are not ~~affiliated with~~ an affiliate of any viable person, unless affiliated by stock ownership.

~~(13)~~(14) "Orphan share fund" means the fund for the orphan share account established in 75-10-743.

~~(14)~~(15) (a) "Owns or operates" means owning, leasing, operating, managing activities at, or exercising control over the operation of a facility.

(b) The term does not include holding the indicia of ownership of a facility primarily to protect a security interest in the facility or other location unless the holder has participated in the management of the facility. The term does not apply to the state or a local government that acquired ownership or control through bankruptcy, tax delinquency, abandonment, lien foreclosure, or other circumstances in which the government acquires title by virtue of its function as sovereign, unless the state or local government has caused or contributed to the release or threatened release of a hazardous or deleterious substance from the facility. The term also does not include the owner or operator of the Milltown dam licensed under part 1 of the Federal Power Act (FERC license No. 2543-004) if a hazardous or deleterious substance has been released into the environment upstream of the dam and has subsequently come to be located in the reservoir created by the dam, unless the owner or operator is a person who would otherwise be liable for a release or threatened release under 75-10-715(1).

~~(15)~~(16) "Person" means an individual, trust, firm, joint-stock company, joint venture, consortium, commercial entity, partnership, association, corporation, commission, state or state agency, political subdivision of the state, interstate body, or the federal government, including a federal agency.

~~(16)~~(17) "Petroleum product" includes gasoline, crude oil (except for crude oil at production facilities subject to regulation under Title 82), fuel oil, diesel oil or fuel, lubricating oil, oil sludge or refuse, and any other petroleum-related product or waste or fraction of the product or waste that is liquid at standard conditions of temperature and pressure (60 degrees F and 14.7 pounds per square inch absolute).

~~(17)~~(18) "Reasonably anticipated future uses" means likely future land or resource uses that take into consideration:

(a) local land and resource use regulations, ordinances, restrictions, or covenants;

(b) historical and anticipated uses of the facility;

(c) patterns of development in the immediate area; and

(d) relevant indications of anticipated land use from the owner of the facility and local planning officials.

~~(18)~~(19) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous or deleterious substance directly into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous or deleterious substance), but excludes releases confined to the indoor workplace environment, the use of pesticides as defined in 80-8-102(30) when they are applied in accordance with approved federal and state labels, and the use of commercial fertilizers, as defined in 80-10-101(2), when applied as part of accepted agricultural practice.

~~(19)~~(20) "Remedial action" includes all notification, investigation, administration, monitoring, cleanup, restoration, mitigation, abatement, removal, replacement, acquisition, enforcement, legal action, health studies, feasibility studies, and other actions necessary or appropriate to respond to a release or threatened release.

~~(20)~~(21) "Remedial action contract" means a written contract or agreement entered into by a remedial action contractor with the state, or with a potentially liable person acting pursuant to an order or request issued by the department, the United States, or any federal agency, to provide a remedial action with respect to a release or threatened release of a hazardous or deleterious substance.

~~(21)~~(22) "Remedial action contractor" means:

(a) any person who enters into and is carrying out a remedial action contract; or

(b) any person who is retained or hired by a person described in subsection ~~(21)(a)~~ (22)(a) to provide services relating to a remedial action.

~~(22)~~(23) "Remedial action costs" means reasonable costs that are attributable to or associated with a remedial action at a facility, including but not limited to the costs of administration, investigation, legal or enforcement activities, contracts, feasibility studies, or health studies."

Section 2. Section 75-10-715, MCA, is amended to read:

"75-10-715. Liability -- reimbursement and penalties -- proceedings -- defenses and exclusions. (1) Except as provided in 75-10-742 through 75-10-752, notwithstanding any other provision of law, and subject only to the defenses set forth in subsection (5) and the exclusions set forth in subsection (7), the following persons are jointly and severally liable for a release or threatened release of a hazardous or deleterious substance from a facility:

(a) a person who owns or operates a facility where a hazardous or deleterious substance was disposed of;

(b) a person who at the time of disposal of a hazardous or deleterious substance owned or operated a facility where the hazardous or deleterious substance was disposed of;

(c) a person who generated, possessed, or was otherwise responsible for a hazardous or deleterious substance and who, by contract, agreement, or otherwise, arranged for disposal or treatment of the substance or arranged with a transporter for transport of the substance for disposal or treatment; and

(d) a person who accepts or has accepted a hazardous or deleterious substance for transport to a disposal or treatment facility.

(2) A person identified in subsection (1) is liable for the following costs:

(a) all remedial action costs incurred by the state; and

(b) damages for injury to, destruction of, or loss of natural resources caused by the release or threatened release, including the reasonable technical and legal costs of assessing and enforcing a claim for the injury, destruction, or loss resulting from the release, unless the impaired natural resources were specifically identified as an irreversible and irretrievable commitment of natural resources in an approved final state or federal environmental impact statement or other comparable approved final environmental analysis for a project or facility that was the subject of a governmental permit or license and the project or facility was being operated within the terms of its permit or license.

(3) If the person liable under subsection (1) fails, without sufficient cause, to comply with a department order issued pursuant to 75-10-711(4) or to properly provide remedial action upon notification by the department pursuant to 75-10-711(3), the person may be liable for penalties in an amount not to exceed two times the amount of any costs incurred by the state pursuant to this section.

(4) The department may initiate civil proceedings in district court to recover remedial action costs, natural resource damages, or penalties under subsections (1), (2), and (3). Proceedings to recover costs and penalties must be conducted in accordance with 75-10-722. Venue for any action to recover costs, damages, or penalties lies in the county where the release occurred or where the person liable under subsection (1) resides or has its principal place of business or in the district court of the first judicial district.

(5) A person has a defense and is not liable under subsections (1), (2), and (3) if the person can establish by a preponderance of the evidence that:

(a) the department failed to follow the notice provisions of 75-10-711 when required;

(b) the release did not emanate from any vessel, vehicle, or facility to which the person contributed any hazardous or deleterious substance or over which the person had any ownership, authority, or control and was not caused by any action or omission of the person;

(c) the release or threatened release occurred solely as a result of:

(i) an act or omission of a third party other than either an employee or agent of the person; or

(ii) an act or omission of a third party other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the person, if the person establishes by a preponderance of the evidence that the person:

(A) exercised due care with respect to the hazardous or deleterious substance concerned, taking into consideration the characteristics of the hazardous or deleterious substance in light of all relevant facts and circumstances; and

(B) took precautions against foreseeable acts or omissions of a third party and the consequences that could foreseeably result from those acts or omissions;

(d) the release or threat of release occurred solely as the result of an act of God or an act of war;

(e) the release or threatened release was from a facility for which a permit had been issued by the department, the hazardous or deleterious substance was specifically identified in the permit, and the release was within the limits allowed in the permit;

(f) in the case of assessment of penalties under subsection (3), factors beyond the control of the person prevented the person from taking timely remedial action; or

(g) the person transported only household refuse, unless that person knew or reasonably should have known that the hazardous or deleterious substance was present in the refuse.

(6) (a) For the purpose of subsection (5)(c)(ii), the term "contractual relationship" includes but is not limited to land contracts, deeds, or other instruments transferring title or possession, unless the real property on which the facility is located was acquired by the person after the disposal or placement of the hazardous or deleterious substance on, in, or at the facility and one or more of the following circumstances is also established by the person by a preponderance of the evidence:

(i) At the time the person acquired the facility, the person did not know and had no reason to know that a hazardous or deleterious substance that is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The person is a governmental entity that acquired the facility by escheat, lien foreclosure, or through any other involuntary transfer or acquisition or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The person acquired the facility by inheritance or bequest.

(b) In addition to establishing one or more of the circumstances in subsection (6)(a)(i) through (6)(a)(iii), the person shall establish that the person has satisfied the requirements of subsection (5)(c)(i) or (5)(c)(ii).

(c) To establish that the person had no reason to know, as provided in subsection (6)(a)(i), the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of assessing this inquiry, the following must be taken into account:

(i) any specialized knowledge or experience on the part of the person;

(ii) the relationship of the purchase price to the value of the property if uncontaminated;

(iii) commonly known or reasonably ascertainable information about the property;

(iv) the obviousness of the presence or the likely presence of contamination on the property; and

(v) the ability to detect the contamination by appropriate inspection.

(d) (i) Subsections (5)(b) and (5)(c) or this subsection (6) may not diminish the liability of a previous owner or operator of the facility who would otherwise be liable under this part.

(ii) Notwithstanding this subsection (6), if the previous owner or operator obtained actual knowledge of the release or threatened release of a hazardous or deleterious substance at the facility when the person owned the real property and then subsequently transferred ownership of the property to another person without disclosing the knowledge, the previous owner is liable under subsections (1), (2), and (3) and a defense under subsection (5)(b) or (5)(c) is not available to that person.

(e) Subsection (6) does not affect the liability under this part of a person who, by any act or omission, caused or contributed to the release or threatened release of a hazardous or deleterious substance that is the subject of the action relating to the facility.

(7) A person has an exclusion and is not liable under this section if:

(a) the person generated or disposed of only household refuse, unless the person knew or reasonably should have known that the hazardous or deleterious substance was present in the refuse;

(b) the person owns or operates real property where hazardous or deleterious substances have come to be located solely as a result of subsurface migration in an aquifer from a source or sources outside the person's property, provided that the following conditions are met:

(i) the owner or operator did not cause, contribute to, or exacerbate the release or threatened release of any hazardous or deleterious substances through any act or omission. The failure to take affirmative steps to mitigate or address contamination that has migrated from a source outside the owner's or operator's property does not, in the absence of exceptional circumstances, constitute an omission by the owner or operator.

(ii) the person who caused, contributed to, or exacerbated the release or threatened release of any hazardous or deleterious substance is not and was not an agent or employee of the owner or operator and is not or was not in a direct or indirect contractual relationship with the owner or operator, unless the department provides a written determination that an existing or proposed contractual relationship is an insufficient basis to establish liability under this section;

(iii) there is no other basis of liability under subsection (1) for the owner or operator for the release or threatened release of a hazardous or deleterious substance; and

(iv) the owner or operator cooperates with the department and all persons conducting department-approved remedial actions on the property, including granting access and complying with and implementing all required institutional controls;

(c) the person owns or occupies real property of 20 acres or less for residential purposes, provided that the following conditions are met:

(i) the person did not cause, contribute to, or exacerbate the release or threatened release of any hazardous or deleterious substance through any act or omission;

(ii) the person uses or allows the use of the real property for residential purposes. This exclusion does not apply to any person who acquires or develops real property for commercial use or any use other than residential use.

(iii) at the time the person purchased or occupied the real property, there were no visible indications of contamination on the surface of the real property;

(iv) the person cooperates with the department and all persons conducting department-approved remedial actions on the property, including granting access and complying with and implementing all required institutional controls; and

(v) there is no other basis of liability under subsection (1) for the owner or occupier for the release or threatened release of a hazardous or deleterious substance.

(8) A person is liable under this section if the department provides substantial credible evidence that the person fails to satisfy any element of each exclusion in subsections (7)(a) through (7)(c).

(9) The liability of a fiduciary under the provisions of this part for a release or a threatened release of a hazardous or deleterious substance from a facility held in a fiduciary capacity may not exceed the assets held in the fiduciary capacity that are available to indemnify the fiduciary unless the fiduciary is liable under this part independent of the person's ownership or actions taken in a fiduciary capacity.

(10) A person who holds indicia of ownership in a facility primarily to protect a security interest is not liable under subsections (1)(a) and (1)(b) for having participated in the management of a facility within the meaning of ~~75-10-701(14)(b)~~ 75-10-701(15)(b) because of any one or any combination of the following:

(a) holding an interest in real or personal property when the interest is being held as security for payment or performance of an obligation, including but not limited to a mortgage, deed of trust, lien, security interest, assignment, pledge, or other right or encumbrance against real or personal property that is furnished by the owner to ensure repayment of a financial obligation;

(b) requiring or conducting financial or environmental assessments of a facility or a portion of a facility, making financing conditional upon environmental compliance, or providing environmental information or reports;

(c) monitoring the operations conducted at a facility or providing access to a facility to the department or its agents or to remedial action contractors;

(d) having the mere capacity or unexercised right to influence a facility's management of hazardous or deleterious substances;

(e) giving advice, information, guidance, or direction concerning the administrative and financial aspects, as opposed to day-to-day operational aspects, of a borrower's operations;

(f) providing general information concerning federal, state, or local laws governing the transportation, storage, treatment, and disposal of hazardous or deleterious substances and concerning the hiring of remedial action contractors;

(g) engaging in financial workouts, restructuring, or refinancing of a borrower's obligations;

(h) collecting rent, maintaining utility services, securing a facility from unauthorized entry, or undertaking other activities to protect or preserve the value of the security interest in a facility;

(i) extending or denying credit to a person owning or in lawful possession of a facility;

(j) in an emergency, requiring or undertaking activities to prevent exposure of persons to hazardous or deleterious substances or to contain a release;

(k) requiring or conducting remedial action in response to a release or threatened release if prior notice is given to the department and the department approves of the remedial action; or

(l) taking title to a facility by foreclosure, provided that the holder of indicia of ownership, from the time the holder acquires title, undertakes to sell, re-lease property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of the property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the facility and taking all facts and circumstances into consideration and provided that the holder does not:

(i) outbid or refuse a bid for fair consideration for the property or outbid or refuse a bid that would effectively compensate the holder for the amount secured by the facility;

(ii) worsen the contamination at the facility;

(iii) incur liability under subsection (1)(c) or (1)(d) by arranging for disposal of or transporting hazardous or deleterious substances; or

(iv) engage in conduct described in subsection (11).

(11) The protection from liability provided in subsections (9) and (10) is not available to a fiduciary or to a person holding indicia of ownership primarily to protect a security interest if the fiduciary or person through affirmative conduct:

(a) causes or contributes to a release of hazardous or deleterious substances from the facility;

(b) allows others to cause or contribute to a release of hazardous or deleterious substances; or

(c) in the case of a person holding indicia of ownership primarily to protect a security interest, actually participates in the management of a facility by:

(i) exercising decisionmaking control over environmental compliance; or

(ii) exercising control at a level comparable to that of a manager of the enterprise with responsibility for day-to-day decisionmaking either with respect to environmental compliance or substantially all of the operational, as opposed to financial or administrative, aspects of the facility."

Section 3. Section 75-10-721, MCA, is amended to read:

"75-10-721. Degree of cleanup required -- permit exemption -- financial assurance. (1) A

remedial action performed under this part or a voluntary cleanup under 75-10-730 through 75-10-738 must attain a degree of cleanup of the hazardous or deleterious substance and control of a threatened release or further release of that substance that assures protection of public health, safety, and welfare and of the environment.

(2) In approving or carrying out remedial actions performed under this part, the department:

(a) except as provided in subsection (4), shall require cleanup consistent with applicable state or federal environmental requirements, criteria, or limitations;

(b) may consider substantive state or federal environmental requirements, criteria, or limitations that are relevant to the site conditions; and

(c) shall select remedial actions, considering present and reasonably anticipated future uses, giving due consideration to institutional controls, that:

(i) demonstrate acceptable mitigation of exposure to risks to the public health, safety, and welfare and the environment;

(ii) are effective and reliable in the short term and the long term;

(iii) are technically practicable and implementable;

(iv) use treatment technologies or resource recovery technologies if practicable, giving due consideration to ~~institutional and~~ engineering controls; and

(v) are cost-effective.

(3) In selecting remedial actions, the department shall consider the acceptability of the actions to the affected community, as indicated by community members and the local government.

(4) The department may select a remedial action that does not meet an applicable state environmental requirement, criteria, or limitation under any one of the following circumstances:

(a) The remedial action is an interim measure and will become part of a total remedial action that will attain the applicable requirement, criteria, or limitation.

(b) Compliance with the applicable requirement, criteria, or limitation will result in greater risk to human health and the environment than other remedial action alternatives.

(c) Compliance with the applicable requirement, criteria, or limitation is technically impracticable from an engineering perspective.

(d) The remedial action will attain a standard of performance that is equivalent to that required under the otherwise applicable requirement, criteria, or limitation through use of another method or approach.

(e) Compliance with the requirement would not be cost-effective.

(5) For purposes of this section, cost-effectiveness must be determined through an analysis of incremental costs and incremental risk reduction and other benefits of alternatives considered, taking

into account the total anticipated short-term and long-term costs of remedial action alternatives considered, including the total anticipated cost of operation and maintenance activities.

(6) The department may exempt any portion of a remedial action that is conducted entirely on site from a state or local permit that would, in the absence of the remedial action, be required if the remedial action is carried out in accordance with the standards established under this section and this part.

(7) The department may require financial assurance from a liable person in an amount that the department determines will ensure the long-term operation and maintenance of the remedial action site. The liable person shall provide the financial assurance by any one method or combination of methods satisfactory to the department, including but not limited to insurance, guarantee, performance or other surety bond, letter of credit, qualification as a self-insurer, or other demonstration of financial capability."

Section 4. Institutional controls. (1) An owner of real property may, with department approval, restrict the use of the owner's real property to mitigate the risk posed to the public health, safety, and welfare and the environment by imposing on the real property, without conveying the property or creating a dominant and servient estate, an appropriate institutional control.

(2) An institutional control restricting present and future real property rights is placed on a property by filing a written instrument evidencing the restrictions to be placed on the use of the property with the county clerk in the county in which the property is located.

(3) An institutional control that restricts real property runs with the land and is binding on all successors in interest to real property until the institutional control is removed.

(4) An institutional control must be removed if there is not an unacceptable risk posed to public health, safety, and welfare and the environment. An owner may request department approval to remove all or a portion of the institutional controls from the real property. The department shall review the request and provide the owner with its decision to approve or deny the request within 120 days from the department's receipt of the request. If the department denies the request, it shall provide the owner with a written explanation of the denial. A department decision to deny the request may be appealed to the board of environmental review and conducted as a contested case proceeding pursuant to Title 2, chapter 4.

(5) If the department or the board approves an owner's request to remove all or a portion of the institutional controls, the owner shall file the approval with the county clerk in the county in which the real property is located.

Section 5. Remedial action costs. (1) If a potentially liable person or assignee recovers remedial action costs at a particular site from a financially responsible party, reimbursement from the orphan share is proportionally reduced by the amount of remedial action costs recovered, less any litigation expenses, including attorney fees and costs.

(2) The department may, in defending the orphan share, initiate a court action against a potentially liable party, an affiliate, or another financially responsible party to recover the orphan's share.

Section 6. Repealer. Section 27, Chapter 584, Laws of 1995, is repealed.

Section 7. Codification instruction. [Sections 4 and 5] are intended to be codified as an integral part of Title 75, chapter 10, part 7, and the provisions of Title 75, chapter 10, part 7, apply to [sections 4 and 5].

Section 8. Effective date. [This act] is effective on passage and approval.

- END -

Latest Version of HB 486 *(HB0486.ENR)*
Processed for the Web on April 16, 1999 (9:59AM)

New language in a bill appears underlined, deleted material appears stricken.

Sponsor names are handwritten on introduced bills, hence do not appear on the bill until it is reprinted. See the status of the bill for the bill's primary sponsor.

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